Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICHARD S. ROSS. ESQ., PETITIONER

v.

STATE CONTRACTING & ENGINEERING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the court of appeals so fundamentally misread substantive Florida law on the effect of a contingent fee agreement between co-counsel when one of the attorneys is discharged by the client that it has nullified Florida law on the subject, created unprincipled federal common law and subverted the policies of comity and federalism which underlie this Court's decisions in *Erie R. Co. v. Tompkins*, 304 U.S. 65(1938) and its progeny?

2. Can the respondent be the "prevailing party" and therefore entitled to the payment of its attorneys' fees in this charging lien litigation brought by the petitioner where despite its four discrete defenses that there was no contract at all for attorney's fees, the petitioner nonetheless achieved enforcement of the contingent fee agreement and recovered $1,094,483.34 in fees thereunder?

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The unpublished opinion of the United States Court of Appeals for the Federal Circuit in *State Contracting & Engineering Corporation v. Condotte America, Inc. et al. and Richard S. Ross*, C.A. Nos. 05-1423 and 1528, decided December 22, 2006, denying the request of the respondent State Contracting & Engineering Corporation to have the petitioner pay its appellate attorney's fees, is set forth in the Appendix hereto(App. 1-3).

The published opinion of the United States Court of Appeals for the Federal Circuit in *State Contracting & Engineering Corporation v. Condotte America, Inc. et al. and Richard S. Ross*, 2006 U.S. App. LEXIS 18743, decided July 24, 2006, affirming the decision of the District Court which adjudicated the petitioner's charging lien for attorney's fees against the respondent State Contracting & Engineering Corporation, is set forth in the Appendix hereto(App.4-28).

The published decision of the District Judge for the Southern District of Florida in *State Contracting & Engineering Corporation v. Condotte America, Inc.*, 368 F. Supp. 2d 1296(S.D. Fla. 2005), filed March 31, 2005, adopting the Magistrate's findings and affirming his determination that the petitioner was entitled to a contingent fee from the respondent's recovery in its lawsuit in the amount of $1,094,483.34, is set forth in the Appendix hereto(App. 69-90).

The unpublished decision of the District Judge for the Southern District of Florida in *State*

Contracting & Engineering Corporation v. Condotte America, Inc., C.A. No. 97-7014-CV, decided May 27, 2005, granting in part and denying in part the petitioner's motion for reconsideration, is set forth in the Appendix hereto(App. 39-68).

The unpublished decision of the District Judge for the Southern District of Florida in *State Contracting & Engineering Corporation v. Condotte America, Inc.*, C.A. No. 97-7014-CV, decided August 11, 2005, adopting the Magistrate's findings and affirming his determination that the petitioner was not entitled to attorney's fees as the prevailing party while the respondent was entitled to an award of attorney's fees in the amount of $248,404.96, is set forth in the Appendix hereto(App. 29-38).

The unpublished report and recommendation of United States Magistrate for the Southern District of Florida in *State Contracting & Engineering Corporation v. Condotte America, Inc.*, C.A. No. 97-7014-CV, filed October 25, 2004, finding that the petitioner was entitled to a contingent fee from the respondent's recovery in its lawsuit in the amount of $1,094,483.34, is set forth in the Appendix hereto(App. 91-174).

The unpublished opinion of the United States Court of Appeals for the Federal Circuit in *State Contracting & Engineering Corporation v. Condotte America, Inc. et al. and Richard S. Ross*, C.A. Nos. 05-1423 and 1528, decided October 2, 2006, denying the petitioner's combined petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto(App.175-176).

The Engagement Agreement executed by the petitioner, John H. Faro and the respondent, dated May 1, 1997, is set forth in the Appendix hereto(App. 177-179).

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit affirming the decisions of the District Court which determined that the petitioner was entitled to a contingent fee from the respondent's recovery in its lawsuit in the amount of $1,094,483.34 but deducting from that amount the respondent's attorney's fees of $248,404.96, was entered on July 24, 2006; and its further order denying the petitioner's timely filed combined petition for panel rehearing or for rehearing *en banc* was filed and decided on October 2, 2006(App. 2-28;175-176).

On December 14, 2006, the petitioner timely applied to The Chief Justice of this Court for an extension of time to file his petition for writ of certiorari(Docket No. 06A622); and on December 27, 2006, The Chief Justice granted the petitioner's motion extending the time to file his petition for writ of certiorari until February 1, 2007. This petition for writ of certiorari is filed within the time limits prescribed by the Chief Justice in Docket No. 06A622, allowing the petitioner's application for an extension of time to file this petition.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to thepeople.

28 U.S.C. Section 1338(a):

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents....Such jurisdiction shall be exclusive of the courts of the states in patent...cases.

28 U.S.C. Section 1367(a):

Except as [otherwise] provided...by Federal statute, in any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution....

Rule 4-1.5(d) of the Rules Regulating the

Florida Bar:

Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating the Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

Rule 4-1.5(f)(1) and (2) of the Rules Regulating the Florida Bar:

Contingent Fees. As to contingent fees:

(1) ....A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted either before or after the contingent fee is calculated.....

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the

law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved....

Rule 4-1.5(g) of the Rules Regulating the Florida Bar:

Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fees between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is in proportion to the services performed by each lawyer; or

(2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made....

STATEMENT

While an entity known as State Paving was performing various road projects for the Florida Department of Transportation (FDOT) in the late 1980's, one of its employees invented a new and more

cost-effective way of constructing a sound wall system for use adjacent to highways. The respondent State Contracting & Engineering Corporation ("the respondent" or "State") became an assignee of the patents for this system in1994.

When FDOT and its subcontractors refused to pay royalties to State for using its patented sound wall system, State retained John H. Faro in order to prepare a pre-litigation memo in order to assess the advisability of bringing suit against FDOT and its subcontractors for patent infringement. After Faro advised State that because of a disability he could not provide it with litigation services, only litigation support services, Faro contacted the petitioner Richard S. Ross, Esq. ("the petitioner" or "Ross"), a qualified Florida patent litigation attorney, to act as lead counsel in this anticipated patent infringement suit.

State agreed to retain Faro and Ross and by May 1, 1997, Faro had drafted and circulated to State for its acceptance a two-page engagement letter which described a partial periodic, partial contingency fee for the work which he (Faro) and Ross would perform on behalf of State(App. 177-179). The engagement letter was signed by Faro and Ross; and it had attached to it a four-page copy of Rule 4-1.5 of the Rules Regulating the Florida Bar. It proposed a reduced hourly billing fee of $100 per hour, plus expenses, as well as a one-third (33%) contingent fee consistent with the contingent fee schedule in the attached Rule but less any amount of attorney's fees billed and collected against recovery at the time of settlement(App. 102-103;178).

The engagement letter further provided that "in no event would the amount of the net fee for representation be less than one third of the value of the settlement to your company"(App. 178). In case of a dispute concerning the described fee arrangement necessitating a collection action against State, both Faro and Ross reserved the right to seek attorney's fees as part of the costs of any collection(App. 178).

State agreed with the engagement letter and its President (Tim Smith) signed it, initialed each page and returned it to Faro(App.178). Ross was not involved with the drafting of this engagement letter. However, the engagement letter itself indicated that a copy had been sent to Ross; he agreed with its terms; and he signed it(App. 101-103;178).

Although the engagement letter made no mention of how the contingency fee would be divided between Faro and Ross, both assumed that it would be equally divided since both verbally agreed to work on the case equally and to share in the contingency equally, having never agreed to a proportionate share of the fee. In so agreeing, Ross knew that he would have the primary litigation responsibilities for State's patent infringement action against FDOT and the infringing sub-contractors.

On August 25, 1997, the petitioner Ross on behalf of State brought the instant action in federal district court, the first of two patent infringement actions, against FDOT and several allegedly infringing contractors, positing jurisdiction on 28 U.S.C. Section 1338(a). Consistent with the engagement letter, Ross billed the respondent at $100 per hour for his services

and by November of 2003, he had billed State 2,388.5 hours or $238,850 in fees, all of which State paid. Some of this work included Ross' efforts in having the trial court's grant of summary judgment against State successfully reversed by the court of appeals for the Federal Circuit.

After remand, a jury trial of this matter ensued in the district court with Ross as lead counsel for State and Faro in the "second chair." On February 6, 2002, a jury returned a verdict awarding State royalties for patent infringement in the amount of about $5.2 million; a permanent injunction was also entered in State's favor. The judgment which ultimately entered included prejudgment interest and totaled $9.3 million. The infringing contractors appealed.

In the meantime, on March 1, 2002, Ross began a second patent infringement suit in federal district court on behalf of State against a new set of infringing FDOT subcontractors. Thereafter a dispute arose between Faro and the petitioner concerning their respective contingency shares under the engagement letter, a disagreement which led Ross to draft a new proposed engagement letter which would supercede the original one. Faro did not agree to the proposed revisions and neither did State. Instead, the original engagement letter continued to be the operating agreement between Faro, Ross and State.

The relationship between Faro and Ross continued to deteriorate over the issue of their respective shares of the contingency fee so that by June 19, 2003, after learning that Faro was now investigating Ross's divorce in order to compromise him with State,

the petitioner Ross gave State an ultimatum: because he could no longer work with Faro, State could discharge Faro, discharge him or discharge both of them. In the face this ultimatum by Ross, State decided to discharge Faro and did so by letter of June 23, 2003, about four months prior to the occurrence of the contingency described in the engagement letter.

After Faro's discharge, the petitioner Ross by himself represented State in litigating the second patent infringement suit in federal district court. In the meantime, Ross was also responsible for responding to the appeal by the infringing subcontractors in the first suit. As a result of that appeal, the court of appeals for the Federal Circuit on October 7, 2003, affirmed the judgment in part and reversed the judgment in part, remanding the matter to the district court for the purpose *inter alia* of having the fact issue of the patents' obviousness decided by a jury.

Faced with the prospect of a new trial on the first suit together with an imminent trial on its second patent infringement suit, State entered into a settlement agreement on October 15, 2003, whereby FDOT agreed to pay State $8 million and the parties agreed to dismiss all pending suits. In addition, FDOT would include State's patented method of constructing a sound wall system for use adjacent to highways on its list of approved sound wall systems. The contingency described in the engagement letter of May 1, 1997, took place on October 15, 2003, with the district court's order dismissing State's two infringement actions with prejudice.

In the aftermath of the settlement, Faro and

then Ross filed charging liens in the federal district court, invoking the court's supplemental jurisdiction under 28 U.S.C. Section 1367(a). On February 26, 2004, Faro settled his charging lien with State for a total *quantum meruit* fee of $1,315,900. This amount represented $1.1 million from funds in the court registry plus the $215,900 in hourly fees which State had previously paid Faro. On March 1, 2004, the petitioner Ross filed a motion to adjudicate his charging lien on the $6.9 million, plus interest, remaining in the court registry in connection with State's settlement of the litigation(App. 123).

The petitioner's charging lien was assigned for resolution to Magistrate Judge Edwin G. Torres of the district court for the Southern District of Florida and he conducted a five-day evidentiary hearing commencing in March of 2004(App. 94-97;123). Throughout this hearing, State argued both orally and in writing that Ross was not entitled to recover in contract on his charging lien for a one-third (33%) contingent fee from the total recovery by State. Instead, it contended that Ross was relegated to a fee based upon a *quantum meruit* measure of compensation.

Specifically, State raised *four* discrete defenses to Ross' recovery of his fee on a contract theory. It contended that the petitioner was *not* a party to the contract, i.e., the engagement letter of May 1, 1997, and therefore could not enforce the contingent fee agreement to his benefit; that the contract was unenforceable by Ross in any event because of his (and Faro's) violations of the Rules Regulating the Florida Bar about contingent fees; that the contract was fatally

indefinite about the meaning of the term "value of the settlement" and was therefore unenforceable; and that once Faro was discharged by State on June 23, 2003, the contingency fee contract contained in the engagement letter was rescinded and was therefore a nullity(App. 126-150).

On October 25, 2004, the Magistrate Judge issued his findings of fact and conclusions of law which in twenty-five pages rejected each one of these four separate arguments by State challenging the validity and enforceability of the petitioner's fee agreement(App. 126-150). Turning to Ross' argument that he was entitled to the entire contingent fee of $2.66 million because Faro was discharged by State prior to the occurrence of the contingency, the Magistrate Judge concluded that "the settled rule" was that absent contrary evidence, the petitioner and Faro were joint venturers who had implicitly agreed upon a 50-50% split of the contingent fee(App. 151-152).

In so ruling, the lower court rejected as misplaced the petitioner's argument that depriving him of the entire contingent fee is contrary to Florida law, e.g., *Rosenberg v. Levin*, 409 So.2d 1016,1021(Fla. 1982), which provides that when an attorney is discharged prior to the occurrence of the contingency, he is only entitled to *quantum meruit* fee, *not* the contract fee(App. 153-155). Ignoring *Rosenberg* altogether, the Magistrate Judge instead concluded this was a joint venture and that Ross' contract fee must inevitably be reduced by Faro's contract fee(App.154-155).

Having determined that Ross was entitled to " his contractual contingent fee," the Magistrate Judge

calculated the total one-third contingent fee on this $8 million settlement to be $2.66 million(App. 162). The petitioner's 50% share was found to be $1.33 million less $238,850 in hourly fees already paid him or a total fee on his charging lien of $1,094,483.34 together with his pro rata share of interest earned by the funds while located in the court's registry(App. 92;162).

The petitioner objected in the district court to some of the Magistrate Judge's findings of fact and his conclusion of law that he was not entitled to the entire contingent fee under the rationale of *Rosenberg*. In an omnibus order approving the Magistrate Judge's report and recommendation and discharging the petitioner's charging lien, the district court, Dimitrouleas, J., *inter alia* affirmed the Magistrate's determination that Ross was not entitled to the entire contingent fee of $2.66 million once Faro was discharged by State and before the contingency occurred(App. 76-78). It determined that this was a joint venture where both Faro and Ross had agreed to split the fee equally and that the Magistrate accordingly did not err by awarding just 50% of the contingent fee to Ross(App. 77-78). In a later order, the district judge refused to reconsider its ruling(App. 44).

In the wake of the Magistrate Judge's decision in October of 2004, both Ross and State moved for the award of their respective attorney's fees, each claiming to be the prevailing party under the fee agreement. The matter was referred to the Magistrate Judge who on July 1, 2005, recommended that the district court find that State was the prevailing party and award it $248,404.96 for its attorney's fees(App. 30-31). As he found, "the crux of the dispute throughout the charging

lien litigation was the numerical valuation of Ross' recovery—an issue on which Ross did not prevail"(App. 33).

On August 11, 2005, the district judge, Dimitrouleas, J., approved the Magistrate Judge's recommendation by ruling that the significant issue in the charging lien litigation was not the validity and enforcement of the fee contract but rather the amount of Ross' recovery thereunder(App. 32-35).

Ross appealed to the court of appeals for the Federal Circuit these decisions by the district judge adjudicating his charging lien against State to be in the amount of just $1,094,483.34 and awarding State its attorney's fees as the prevailing party(App. 5). On July 24,2006, a majority of the court of appeals affirmed both of these decisions by the district judge(App. 4-28).

It first rejected the petitioner's claim under authoritative Florida law, especially *Rosenberg* and *Adams v. Fisher*, 390 So.2d 1248(Fla. Dist. Ct. App. 1980), that he was entitled to the entire contingent fee(App. 16-18). Ross had argued that under these decisions a discharged attorney such as Faro could only receive a *quantum meruit* fee; and the lawyer who is representing the client when the case is settled, i.e., Ross, is entitled to the entire contract fee(App. 16-18). As the majority saw it, those cases were distinguishable from this arrangement where Faro and Ross had initially agreed to share the fee equally and the parties continued to operate under the engagement letter even after Faro was discharged(App. 17-18). It therefore refused Ross' invitation "to reform the contract to increase State['s]...fee obligations beyond

the amount to which it initially agreed," i.e., to pay one-third of the value of the settlement in attorney's fees(App. 17-18).

The majority also rejected the petitioner's argument that he was the prevailing party below and therefore should not have been assessed the payment of State's attorney's fees(App. 22-24). It concluded that there was no abuse of discretion by the district judge in deciding that State had prevailed on the significant issue in the litigation:

> Here, the magistrate judge determined that the significant issue in Ross' charging lien litigation was the dispute over the meaning of "value of the settlement." Ross contends that the significant issue was whether the engagement letter was an enforceable contract. *However, the magistrate judge held that State['s]...primary theory—both before and during the charging lien litigation—was that the contract was enforceable but that the value of the settlement was limited to the $8 million cash settlement.*

(App. 23)(emphasis supplied).

Circuit Judge Dyk dissented from these two rulings by the majority(App.24-28). As he noted, Florida law clearly provides that having been discharged by State without cause, Faro was entitled to recover only the *quantum meruit* value of his legal services and that Ross who continued to work on behalf of State up to settlement, was entitled the remainder of the contingent fee(App. 25). Even though Faro and Ross had initially agreed to divide the contingent fee

equally, Judge Dyk "fail[ed] to see how that agreement can change the result under the Florida cases"(App. 25).

Moreover, as the dissent noted, the default rule adopted by the Florida courts that when an attorney is discharged without cause he is entitled to recover only the *quantum meruit* value of his legal services from the client

> makes eminent sense. For example, here if Faro had been discharged one day after the agreement was reached and after performing six hours of work under it, it would be unfair to the extreme that Faro should nonetheless receive one half of the contingent fee when Ross spent years of work fulfilling the service obligations under the agreement with the client....
>
> Significantly, Faro himself...explicitly agreed [in court filings] that he would only have been entitled to *quantum meruit* recovery....

(App. 26).

Nor did Judge Dyk think that the advanced stage of the litigation or the fact that Ross wanted Faro discharged make inequitable adherence to the default rule enunciated by the Florida courts in *Rosenberg*(App. 27). As he noted, there is nothing in Florida law to indicate that the result should turn on such considerations and, in any event, the decision by Faro and Ross to terminate their relationship was mutual and Ross performed the lion's share of the work up in this case until settlement(App. 27).

Thus the dissent "saw no basis for denying recovery of the full contingent fee to Ross less whatever Faro's *quantum meruit* recovery should have been (which amount may be significantly different than the amount that State...agreed to pay Faro in settlement)"(App. 27). Because of this view, Judge Dyk would also have vacated the award of attorney's fees to State as the prevailing party and remanded the matter to the district court in order to determine the contract fee award for the petitioner.

On October 2, 2006, the court of appeals denied the petitioner's timely filed combined petition for panel rehearing or for rehearing *en banc*(App. 175-176).On December 27, 2006, The Chief Justice granted the petitioner's motion extending the time to file his petition for certiorari until February 1, 2007.

REASONS FOR GRANTING THE PETITION

1. The Decision By the Federal Courts Below Has Effectively Nullified Substantive Florida Law On the Rights of Attorneys and Their Clients Under Contingent Fee Agreements When An Attorney Is Discharged Prior to the Contingency, Creating Federal Common Law, Instigating Forum Shopping and Subverting the Policies of Federalism and Comity Enunciated In *Erie R. Co. v. Tompkins*, 304 U.S. 63(1938) and Its Progeny.

In *Rosenberg v. Levin*, 409 So. 2d 1016(Fla. 1982), the Supreme Court of Florida considered the proper basis for compensating an attorney discharged without cause by his client after he had performed legal services under a valid contract for employment. There the client

hired two attorneys under a letter agreement which provided for a $10,000 fixed fee plus a contingent fee equal to 50% of all amounts recovered in excess of $600,000. *Id.* at 1017. The client later discharged both of them before the legal controversy was resolved and he subsequently settled the matter for $500,000. *Id.* at 1018.

The attorneys sued for their attorney's fees based upon a *quantum meruit* evaluation of their services. The trial judge awarded them $55,000 using this standard of compensation. *Id.* The district court of appeal, however, while agreeing that *quantum meruit* was the appropriate basis for recovery, awarded them just $10,000, stating that their recovery could in no event exceed the amount which the attorneys would have received under their contract with the client if not prematurely discharged. *Id.*

On further appeal, the Supreme Court of Florida noted the two conflicting interests involved when an attorney working for a client under a contingent fee agreement is prematurely discharged without cause by the client before the contingency takes place:

> The first is the need of the client to have confidence in the integrity and ability of his attorney and, therefore, the need for the client to have the ability to discharge his attorney when he loses that necessary confidence in the attorney. The second is the attorney's right to adequate compensation for work performed.

Id. at 1019. As the court noted, on the one hand, if recovery under *quantum meruit* is not limited to the

terms of the contracted fee amount, the client may be penalized for exercising his right to discharge his attorney by becoming liable without limit for fees to which he never agreed, a result which would undermine public confidence in the legal profession. *Id.* at 1021. On the other hand, attorneys should not be penalized either and should have the opportunity to recover for services performed. *Id.* at 1021;1022. See *The Florida Bar v. John Doe*, 550 So. 2d 1111, 1113(Fla. 1989); *Arabia v. Siedlecki et* al., 789 So. 2d 380, 390-391(Fla. Dist. Ct. App. 2001); Searcy, *Denney, Scarola et al. v. Scheller*, 629 So. 2d 947, 950(Fla. Dist. Ct. App. 1993).

In an attempt to harmonize these competing concerns, the *Rosenberg* Court adopted a modified *quantum meruit* rule. It held that an attorney employed under a valid contract of employment who is discharged by the client without cause before the contingency has occurred or before the client's matters have been concluded, can recover only the reasonable value of his services rendered prior to the discharge, limited by the maximum contract fee. *Id.* Furthermore, in a contingent fee case, the attorney's action for *quantum meruit* arises only upon the successful occurrence of the contingency; if the client fails in his recovery, the discharged attorney will similarly fail and recover nothing. *Id.* at 1022. *Accord, Franklin & Marbin, P.A. v. Mascola*, 711 So. 2d 46, 50(Fla. Dist. Ct. App. 1998); *Schwanebeck v. Calzado*, 524 So. 2d 478, 479(Fla. Dist. Ct. App. 1988).

Rosenberg's rule is informed by the Florida intermediate appellate decisions in both *Jones & Granger v. Johnson*, 788 So. 2d 381, 383-384(Fla. Dist. Ct. App. 2001) and *Adams v. Fisher*, 390 So. 2d 1248,

1250-1251(Fla. Dist. Ct. App. 1980), cases which answer the question: from whom can the discharged attorney recover his fees? In both of those cases, the attorney initially hired by the client under a contingent fee agreement was discharged without cause and replaced by another attorney who consistent with his own contingency fee agreement with the client brought the case to settlement. When the discharged attorneys in both cases were subsequently awarded compensation out of the fee recovered by the substitute attorney based upon *quantum meruit* principles, the Florida courts reversed both awards. It held that while *quantum meruit* was the proper basis of compensation, the client, *not* the substitute attorney, was liable for the payment of the discharged attorney's fees. 788 So. 2d at 383; 390 So. 2d at 1251.

As both these courts concluded,

> [s]uch a rule [making the client responsible for payment of the fees of the discharged attorney] insures the right of a client to discharge an attorney at any time with or without cause, *but it also makes the client responsible for his actions.* A client may end up paying fees in excess of the original contingent fee, once to the discharged attorney in *quantum meruit* and again to the substituted attorney on a new contingent fee contract.

Id. Thus the rule of *Adams* and *Jones & Granger* "may require a client to pay to the discharged and substituted attorneys an aggregate amount in attorney's fees which would exceed the amount of the contingency fee specified in the fee agreement." *Jones*

& Granger, supra. Accord, Lubell v. Martinez, 901 So. 2d 951, 952(Fla. Dist. Ct. App. 2005). *Carman v. Guardianship of Potter*, 768 So. 2d 1156, 1158(Fla. Dist. Ct. App. 2000); *Sohn v. Brockington*, 371 So. 2d 1089, 1093(Fla. Dist. Ct. App. 1979).

The substantive law of Florida is therefore crystal clear about the result when an attorney under a contingent fee agreement is discharged by the client without cause before the occurrence of the contingency: Once the contingency occurs, he can recover *only from the client* the reasonable value of his services rendered prior to the discharge, limited by the maximum contract fee. Accordingly, when Faro was discharged by State on June 23, 2003, Florida law unmistakably mandated that *State* was bound to pay Faro's fee, one founded on *quantum meruit* principles; that it was also responsible to pay Ross his full fee under the contingent fee agreement; and that the aggregate amount in attorney's fees it would have to pay both Faro and Ross under this prescribed scheme might exceed the amount of the contingency fee specified in the fee agreement.

Nothing in the contingent fee agreement here provides that the petitioner Ross, the attorney who after Faro's discharge remained in the case until a settlement was reached and the contingency occurred, was bound to pay Faro's fee from his earned contingent fee. Nothing in the contingent fee agreement provides that State was entitled to a fee reduction of any amount----much less 50%----in the payment of the contingent fee if only one attorney remained when the contingency occurred. Nor does the agreement relieve State of paying Ross his full fee under the contingent

agreement if it voluntarily decides to pay Faro a fee in order to dismiss his charging lien. Indeed, State was obligated under Florida law to pay Faro a fee under *quantum meruit* principles in any event and meeting that obligation did not bring with it the right to reduce by half the fee due Ross under the contingent fee agreement.

Yet this is precisely the conclusion which the two federal courts below have reached. Ignoring the holdings of *Rosenberg, Jones & Granger* and *Adams*, they have sought in violation of Florida law to transfer to the petitioner the obligation which belongs to State to pay Faro's fee. They have done so by improperly rewriting the fee agreement to include the above provisions; by wrongly characterizing the agreement between Faro and Ross to share equally in the fee agreement as surviving Faro's discharge which *under Florida law* extinguished Faro's rights under the fee agreement and relegated him to a *quantum meruit* assessment of his fee; and by calling the representation of State by Faro and Ross a joint venture which they claim invokes an equal division of the entire contract fee in any event.

The decision below thereby endows Faro with a valuable contract right which even he admitted he does not possess under Florida law, i.e., the right to recover one half of Ross' fee under the fee contract instead of seeking his fee by *quantum meruit*; and it gives State a valuable property right it never possessed under Florida law, i.e., to be relieved of its duty under *Rosenberg, Jones & Granger* and *Adams* of paying Ross the entire fee due him under the contingent fee agreement.

Under *Erie R. Co. v. Tompkins*, 304 U.S. 64(1938), when a federal court exercises diversity, pendent or supplemental jurisdiction over state law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151(1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109(1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which he otherwise would enjoy under state law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742(2000)(Rehnquist, C.J., concurring).

As this Court explained in *Erie*,

> the Constitution of the United States [including the Tenth Amendment]...recognizes and preserves the autonomy and independence of the States---independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

304 U.S. at 78-79. See *Alden v. Maine*, 527 U.S. 706,

754(1999)(our federal system bespeaks the fact that the various States remain sovereign entities whose judicial independence must be respected by Article III courts).

Erie, a vital expression of our federal system, therefore mandates that a federal court sitting in supplemental jurisdiction in this patent infringement suit apply the substantive law of Florida, the forum State, in order to decide the rights of the parties absent a federal statutory or constitutional directive to the contrary. *Salve Regina College v. Russell*, 499 U.S. 225, 226(1991). "The nub of the policy that underlies *Erie*...is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Ferens v. John Deere Co.*, 494 U.S. 516, 524(1990) quoting *Guaranty Trust Co. v. York, supra.*

In addition, this Court has made clear in various decisions after *Erie* that federal courts determine state law in the same manner by which they determine federal law, i.e., "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College v. Russell, supra,* quoting *Meredith v. Winter Haven*, 320 U.S. 228, 238(1943). See *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208-209(1938). See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730(1979); *West v. A.T. & T. Co.*, 311 U.S. 223, 236-237(1940); *Six Companies v. Highway Dist.*, 311 U.S. 180, 188(1940).

Moreover, in view of the court of appeals' affirmative duty under the decisions of this Court to

review independently and then correct the district court's determination of state law when fixing the rights of the parties, *Erie, supra*; *Salve Regina College v. Russell*, 499 U.S. at 231; 234, it was incumbent on the court of appeals for the Federal Circuit to carry out this task with conviction so that the doctrinal coherence between State and federal courts was advanced and the twin aims of *Erie*— "discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468(1965)— were accomplished.

Yet the court of appeals here failed in this fundamental duty. Creating federal "general" common law at odds with the substantive law of Florida in order to reach a particular result, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726(2004), it endowed Faro with a valuable contract right which even he admitted he does not possess under Florida law and it gives State a valuable property right it never possessed under Florida law, i.e., to be relieved of its duty under *Rosenberg, Jones & Granger* and *Adams* of paying Ross the entire fee due him under the contingent fee agreement.

This "blatant federal-court nullification of state law," *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-145(1996), is therefore a matter which invokes this Court's power of superintendency over the federal courts so that the decision here does not damage federal-state relations, does not lead to divergent opinions on this issue of attorney-client relations, a legitimate interest of Florida state law as well as public policy generally, and does not promote forum shopping, all considerations which prompted this Court to decide

Erie in the first place.

2. The Opinion Below Determining That the Respondent Was the "Prevailing Party" For Purposes of An Award of Attorney's Fees Decides An Important Question of Law In A Way That Conflicts With The Relevant Decisions of This Court.

The Magistrate Judge described the principal controversy raised by the petitioner's attempt to enforce his charging lien against State thus:

> There is...clearly a dispute between the parties as to the first two prongs of the stated test for enforcing a charging lien. Ross takes the position that he had an enforceable contract with [State] for a hybrid contingency fee in the case. [*State] counters with the argument that Ross and [State] never had an enforceable contract in the litigation* for Ross to be [State's] attorney. And even if a contract did exist between [State] and Ross that arose from its contract with Faro, *[State] contends that such contract was unenforceable as a matter of law*, thereby leaving Ross with only a *quantum meruit* recovery.

(App. 125)(emphasis supplied). Indeed, throughout the hearing before the Magistrate Judge, State argued both orally and in writing that Ross was not entitled to recover in contract on his charging lien for a one-third (33%) contingent fee from the total recovery by State, contending instead that he was relegated to a fee based upon a *quantum meruit* measure of compensation.

Specifically, State raised *four* discrete defenses to Ross' recovery of his fee on a contract theory. It contended that the petitioner was *not* a party to the contract, i.e., the engagement letter of May 1, 1997, and therefore could not enforce the contingent fee agreement to his benefit; that the contract was unenforceable by Ross in any event because of his (and Faro's) violations of the Rules Regulating the Florida Bar about contingent fees; that the contract was fatally indefinite about the meaning of the term "value of the settlement" and was therefore unenforceable; and that once Faro was discharged by State on June 23, 2003, the contingency fee contract contained in the engagement letter was rescinded and was therefore a nullity(App. 126-150).

Ross was therefore put to the task of both briefing and orally arguing these threshold issues of whether as an initial matter, he could recover his fee under the contingent fee agreement. When the Magistrate Judge issued his findings of fact and conclusions of law, he devoted twenty-five pages of his decision to a reasoned rejection of State's four separate arguments by State challenging the validity and enforceability of the petitioner's contingent fee agreement(App. 126-150). Having found and ruled that the petitioner could recover in contract, he then proceeded to decide that Ross' contract fee must inevitably be reduced by Faro's so-called contract fee and that Ross' share under this calculation was $1,094,483.34(App.154-155;162).

Yet the Magistrate Judge later found that State was the prevailing party in this charging lien litigation and awarded it $248,404.96 for its attorney's fees, to be

paid by the petitioner, because "the crux of the dispute throughout the charging lien litigation was the numerical valuation of Ross' recovery—an issue on which Ross did not prevail"(App. 33). The court of appeals affirmed this ruling.

None of this squares with the decisions of this Court or the Florida Supreme Court defining a "prevailing party" for purposes of awarding attorney's fees. In order to be the prevailing party and therefore entitled to the payment of its attorney's fees, a party seeking such relief must show that it "succeed[ed] on *any* significant issue in litigation which achieves *some of the benefit* the parties sought in bringing suit." *Farrar v. Hobby*, 506 U.S. 103, 109(1992) quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433(1983)(emphasis supplied). *Accord, Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 809-810(Fla. 1992); *Inland Dredging Co. v. Panama City Port Authority*, 406 F. Supp. 2d 1277, 1284(N.D. Fla. 2005)(applying Florida law; "prevailing party" is one who succeeds on the dominant contractual dispute). Indeed, even the recovery of *one dollar* is sufficient to find the petitioner was the prevailing party. *Farrar v. Hobby*, 506 U.S. at 109-110.

If "[l]iability on the merits and responsibility for fees go hand in hand," *Kentucky v. Graham*, 473 U.S. 159, 165(1985), then the petitioner is entitled as a matter of law to the payment of his attorney's fees by State, not the reverse as the lower courts have ruled. The petitioner responded to and prevailed on State's four discrete challenges to his right to recover in contract, the dominant contractual issue. While the courts below considered the *amount* of recovery to be decisive in identifying the prevailing party, they

ignored the fundamental challenges by State in the first instance to Ross' right to seek contract damages at all and the fact that he prevailed on this seminal issue.

Indeed, the petitioner has found no case where an attorney has sought fees from a client, the client was then required to pay some or all of the fees to the attorney as here and the client was thereafter deemed to be the "prevailing party" for the purposes of an attorney's fee award. The petitioner achieved enforcement of the contingent fee agreement, recovered one half of his fees thereunder together with interest and is the prevailing party under the decisions of this Court. As a matter of law, he should not have been ordered to pay State's attorney's fees.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit and, ultimately, to vacate that judgment and remand the matter to the United States District Court for the Southern District of Florida with instructions that the petitioner be awarded the entire amount of the contingent fee under the contract plus accrued interest; declare that he was the prevailing party; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(any footnotes trail end of each document)

05-1423, 05-1528
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STATE CONTRACTING & ENGINEERING CORPORATION,
Plaintiff-Appellee,

v.

CONDOTTE AMERICA, INC. (formerly known as Recchi America, Inc.), THE MURPHY CONSTRUCTION COMPANY, THE HARDAWAY COMPANY, HUBBARD CONSTRUCTION COMPANY, BALFOUR BEATTY CONSTRUCTION, INC., COMMUNITY ASPHALT CORPORATION, and HANSON PIPE & PRODUCTS SOUTHEAST, INC. (formerly known as Joelson Concrete Pipe Company, Inc.),
Defendants,

v.

RICHARD S. ROSS, ESQ.,
Movant-Appellant.

NOTE: This disposition is nonprecedential.

Before MAYER, BRYSON, and DYK, Circuit Judges.

ORDER

Plaintiff-appellee State Contracting & Engineering

Corporation has filed an application for an award of attorney's fees in connection with the appeal in this case. The question whether to award attorney's fees is governed by Florida state law, and in particular, Fla. Stat. § 57.105(7), which provides that if a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, "the court may also allow reasonable attorney's fees to the other party when that party prevails in any action . . . with respect to the contract."

The Florida statutes also state that a contract provision or statute providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party on appeal.

Although section 57.105(7) uses the word "may," the Florida intermediate appellate courts disagree about whether that statute is discretionary or mandatory. Compare Rochlin v. Cunningham, 739 So. 2d 1215, 1218 (Fla. 4th Dist. Ct. App. 1999) (discretionary), with Landry v. Countrywide Home Loans, Inc., 731 So. 2d 137, 140 (Fla. 1st Dist. Ct. App. 1999) (mandatory). The Florida Supreme Court has not addressed that issue, and a federal district court in Florida has noted that the issue has not been settled by the Florida courts. Inland Dredging Co. v. Panama City Port Auth., 406 F. Supp. 2d 1277, 1283-84 (N.D. Fla. 2005).

Our task is to determine how we believe the Florida Supreme Court would decide that question. See MicroStrategy Inc. v. Business Objects, S.A., 429 F.3d 1344 (Fed. Cir. 2005). In light of the statute's use of the term "may," we conclude that the Florida Supreme

Court would likely construe the statute as discretionary, see In re Estrada, No. 6:03-BK-09952, 2004 WL 3202201 (Bankr. M.D. Fla. Dec. 10, 2004), and therefore we regard the application before us as invoking our discretion whether to award attorney's fees to State Contracting for the appeal.

Appellant Ross's position on appeal was reasonable, as demonstrated by the fact that this court was divided in its resolution of the appeal. Moreover, in our view there were no other circumstances warranting an award of fees for the appeal. We therefore exercise our discretion in this matter and deny the application for an award of fees.

Accordingly,
IT IS ORDERED THAT:
The application for an award of attorney's fees is denied. FOR THE COURT

DEC 2 2 2006

05-1423, 05-1528

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STATE CONTRACTING & ENGINEERING CORPORATION,
Plaintiff-Appellee,

v.

CONDOTTE AMERICA, INC. (formerly known as Recchi America, Inc.), THE MURPHY CONSTRUCTION COMPANY, THE HARDAWAY COMPANY, HUBBARD CONSTRUCTION COMPANY, BALFOUR BEATTY CONSTRUCTION, INC., COMMUNITY ASPHALT CORPORATION, and HANSON PIPE & PRODUCTS SOUTHEAST, INC. (formerly known as Joelson Concrete Pipe Company, Inc.),
Defendants,

v.

RICHARD S. ROSS, ESQ.,
Movant-Appellant.

July 24, 2006, Decided

DISPOSITION: Affirmed.

JUDGES: Before MAYER, BRYSON, and DYK, Circuit Judges. Opinion for the court filed by Circuit Judge BRYSON. Concurring-in-part and dissenting-in-part opinion filed by Circuit Judge DYK.

OPINION BY: BRYSON

OPINION: BRYSON, Circuit Judge.

This appeal arises from a dispute over attorney fees pursuant to a contingent fee contract in a patent infringement case. Attorney Richard S. Ross appeals from a decision of the United States District Court for the Southern District of Florida in Case No. 97-7014-CV that adjudicated his charging lien against State Contracting & Engineering Corp., and also awarded State Contracting attorney fees for its defense against Ross's charging lien litigation. We affirm.

I

In the mid-1990s, State Contracting found itself in a patent infringement dispute with the Florida Department of Transportation. State Contracting sought the advice of attorney John H. Faro, who advised State Contracting to pursue litigation. In May 1997, Faro drafted and signed an engagement letter, to which State Contracting subsequently agreed. In the engagement letter, Faro proposed that Ross would serve as co-counsel during the litigation. As for compensation, the letter provided that Ross and Faro

are agreeable to the following arrangement:

1) Reduced hourly billing fee of $ 100 per hour, plus expenses; plus

2) A Contingent Fee, as set forth in the current Standard Florida Bar Contingent Fee Schedule, copy of

Schedule and & [sic] Statement of Client Rights attached; less

3) A Credit of all attorney fees billed and collected against recovery at the time of settlement, however, in no event would the amount of the net fee for representation be less than one third of the value of the settlement to your Company.

In accordance with their oral agreement, Ross served as lead counsel. Faro performed substantial support functions, including serving as second chair at trial. Faro also handled daily operations during portions of the litigation.

In 2003 Ross and Faro began to dispute the allocation of the total contingent fee. Although Ross proposed at least two amended versions of the fee contract, neither Faro nor State Contracting ever agreed to any of those proposed changes. In June 2003, Ross issued State Contracting an ultimatum, saying that he refused to work with Faro any longer. Because Ross was serving as lead counsel for trial and appellate proceedings in the case, and because trial and appellate deadlines were fast approaching, State Contracting acquiesced in Ross's demand and discharged Faro.

In October 2003 State Contracting entered a global settlement with the Florida Department of Transportation for a payment of $ 8 million. The settlement agreement provided that the Department would list State Contracting's patented design as a permissible design for use by its contractors. The agreement further provided that if any contractors chose to use the patented design, the contractor rather

than the Department would be liable for any royalty payments to State Contracting.

Ross and Faro each filed a charging lien to recover their fees. Faro reached a settlement with State Contracting. That settlement provided for a payment of $ 1,100,000 to Faro (which was in addition to $ 222,900 in hourly fees already paid to him). Ross pursued his lien through a five-day hearing before a magistrate judge, who determined that he was entitled to half of the total contingent fee provided for in the engagement letter. The total contingent fee under the engagement letter, the magistrate judge found, was one third of $ 8 million. Ross was therefore awarded $ 1,094,483.34 (which was in addition to $ 238,850 in hourly fees already paid to him). Subsequently, the court awarded approximately $ 250,000 to State Contracting for fees that it incurred in defending against Ross's claim under the charging lien. Ross appeals, challenging (1) the amount of his attorney fee award under the contingent fee contract and (2) the award to State Contracting of the attorney fees it incurred in defending against Ross's charging lien litigation.

II

State Contracting argues that this court lacks jurisdiction over Ross's appeal from the district court's decision on his charging lien. In State Contracting's view, once the underlying patent infringement claims were voluntarily dismissed with prejudice, the district court's jurisdiction over the suit was no longer premised on 28 U.S.C. § 1338, and so any appeal in the case after the voluntary dismissal should be taken to the Eleventh Circuit, not this court. We disagree. State

Contracting's argument is based on a misreading of this court's case law.

A federal district court has supplemental jurisdiction under 28 U.S.C. § 1367 to hear disputes related to charging liens that are filed against that court's judgments. See, e.g., *Broughten v. Voss*, 634 F.2d 880, 883 (5th Cir. 1981) ("If, upon withdrawal, counsel is unable to secure payment for his services, the court may assume jurisdiction over a claim based on a charging lien over the proceeds of the lawsuit."); see also *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 444, 448 (2d Cir. 1998). Thus, the district court properly exercised jurisdiction over Ross's claim.

As for appellate jurisdiction, 28 U.S.C. § 1295(a)(1) provides that this court has jurisdiction over any appeal in a case from a district court in which the district court's jurisdiction "was based in whole or in part on section 1338." Section 1338 gives district courts exclusive jurisdiction "of any civil action arising under any Act of Congress relating to patents." The district court plainly had jurisdiction over the patent claims in this case, having adjudicated the various patent claims until the case was ultimately resolved through settlement.

State Contracting argues that the district court lost jurisdiction under section 1338 when, as part of the settlement, the patent claims were dismissed with prejudice. State Contracting bases its argument on this court's decision in *Nilssen v. Motorola, Inc.*, 203 F.3d 782 (Fed. Cir. 2000). According to State Contracting, that case stands for the proposition that the "critical

distinction" in determining whether section 1338 jurisdiction survives after the dismissal of all the patent claims is whether the dismissal was involuntary or voluntary. Although the dissenting judge in the Nilssen case advocated that approach, the majority expressly rejected the proposition, noting that the "voluntariness or involuntariness of a dismissal is not controlling." *Id.* at 784-85. Rather, the relevant distinction is whether the patent claims are dismissed with or without prejudice. If all the patent claims in a federal suit are dismissed with prejudice, the district court's jurisdiction over the entire case is still based in whole or in part on section 1338. However, if all the patent claims are dismissed without prejudice, the dismissal order is treated as an amendment to the original complaint, and because jurisdiction is determined based on that "amended" complaint, the district court's jurisdiction is not considered to be based in whole or in part on section 1338. See id.

Here, the patent issues were dismissed with prejudice pursuant to the 2003 settlement agreement. Thus, the district court continued to have jurisdiction of ancillary matters under section 1338. This court therefore has jurisdiction over the appeal.

III

Ross's first argument in this appeal is that the district court erred by refusing to conduct de novo review of certain findings of fact made by the magistrate judge. Ross objected to 28 of the magistrate judge's 93 findings of fact. Pursuant to 28 U.S.C. § 636(b)(1), and subject to any local rules, a party may file with the district court objections to a magistrate judge's

proposed findings. Magistrate Rule 4(b) of the Local Rules of the Southern District of Florida requires such objections to "specifically identify the portions of the proposed findings . . . to which objection is made, the specific basis for such objections, and supporting legal authority." That requirement "facilitates the opportunity for district judges to spend more time on matters actually contested and produces a result compatible with the purposes of the Magistrates Act." *Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. Unit B 1982).* Thus, "[f]rivolous, conclusive, or general objections need not be considered by the district court." *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988).

With respect to 18 of Ross's objections, we agree with the district court that the objections were conclusory and general, and therefore we conclude that the district court was not required to entertain those objections. Four of Ross's objections merely assert that a particular finding was "contrary to the record evidence." See Ross's objections to PP 31, 39, 64, 82 of the magistrate judge's findings. Another 14 of the objections reference testimony or documentary evidence, but without specificity. See Ross's objections to PP 27, 28, 29, 46, 53, 57, 59, 60, 63, 66, 75, 87, 89, and 90 of the magistrate judge's findings. For example, several of the objections assert that a particular finding was "contrary to the evidence of record, including testimony of [certain witnesses]." In some of those instances, the "certain witnesses" are as many as three different witnesses, and the objections do not cite any specific portion of the witnesses' testimony and do not discuss the testimony that supports the objections. The district court did not scour the testimony from the five-day hearing before the magistrate judge in order to

determine whether any of that testimony supported Ross's objections, and we hold that the district court was not required to do so.

Moreover, we see little merit to the 18 objections noted above, and we therefore do not believe Ross was prejudiced by the district court's refusal to consider them. For instance, in P 29 of the findings, the magistrate judge explained that Ross and Faro initially agreed to share equally in the work and the fee. Ross objected to that finding as contrary to the evidence. In his brief on appeal, however, Ross notes that he "had an initial verbal understanding with Faro . . . that if he and Faro each contributed equally to the representation, the contingency fee portion of the Agreement would be split." Thus, Ross does not seem to express any pertinent disagreement with the magistrate judge's finding.

With respect to the remaining 10 objections, Ross at least pointed to some specific evidentiary support for his objections. See Ross's objections to PP 20, 30, 36, 38, 40, 55, 56, 62, 81, 93 of the magistrate judge's findings. Yet even in those 10 instances, he has failed to explain what the proper findings should have been or how the challenged findings affected the outcome of his case. Nonetheless, State Contracting has not shown that Magistrate Rule 4(b) demands that sort of detail, and for that reason we assume for purposes of this appeal that the district court erred by refusing to entertain those 10 objections. As we explain below, however, each of those 10 objections either lacks merit or is irrelevant to the outcome of this case. Therefore, Ross was not prejudiced by the district court's refusal to consider those objections.

Five of the 10 objections do not provide any basis for rejecting the magistrate judge's findings. See Ross's objections to PP 20, 30, 38, 56, 93 of the magistrate judge's findings. For instance, Ross objects to P 20 of the magistrate judge's findings "to the extent the finding fails to include Rule 4-1.5 as part of the 'Engagement Letter.'" However, P 20 acknowledges that the four-page attachment of the Florida Bar Rules was part of the "contingency fee agreement," and the magistrate judge's other findings of fact and conclusions of law confirm that the magistrate judge considered the attachment to be part of the agreement. Indeed, in his discussion of P 56 of the magistrate judge's findings of fact, Ross notes that "there is no dispute that Rule 4-1.5 is part of the contract." Similarly, Ross objects to P 93 of the magistrate judge's findings as "contrary to the record." The portion of P 93 to which Ross objects is the magistrate judge's statement that the parties "stipulated to the dismissal of Faro's charging lien." The record, however, includes a joint stipulation to that effect, which was signed by Ross. Ross has not provided the district court or this court with any explanation of why that joint stipulation might have been ineffective, and we therefore see no basis on which the district court could have sustained Ross's objection.

Three of Ross's objections pertain to findings that had no bearing on the magistrate judge's disposition. See Ross's objections to PP 55, 62, 81 of the magistrate judge's findings. For example, in P 55 the magistrate judge simply recounts that at one time during their joint representation Faro contended that he should be entitled to between 45 and 55 percent of the contingency fee. Ross insists that that paragraph is

inconsistent with the magistrate judge's findings that Ross and Faro verbally agreed to split the contingency fee equally. Ross's objection merely highlights the fact that the magistrate judge did not rely on any of the findings in P 55 to reach his conclusion in this case. Rather, P 55 is provided as background information to explain how the dispute between Ross and Faro arose.

The remaining two objections pertain to PP 36 and 40 of the magistrate judge's findings, and to the question whether the "value of the settlement" included revenue from future royalty payments. Although the district court stated that all of Ross's objections were legally insufficient, the court gave considerable attention to the magistrate judge's key findings, and with respect to whether "value of the settlement" included revenue from future royalty payments, the court concluded that "the evidence does not support Ross's contention[s]." Thus, the district court considered the substance of Ross's factual contentions in this regard and rejected his contentions as unsupported by the evidence. Likewise, with respect to many of the other objections mentioned above, the district court addressed the magistrate judge's relevant findings of fact and concluded that Ross's contentions were not supported by the evidence. Thus, any error in the district court's refusal to expressly address Ross's objections to the magistrate judge's findings of fact did not prejudice Ross because the court's refusal did not affect the outcome of this case.

IV

Most of Ross's substantive challenges to the district court's decision boil down to a dispute as to the proper

division of fees between Faro and Ross. Typically, such a dispute is litigated between the lawyers, as the client has little interest in how the fee is split among lawyers. See, e.g., *Halberg v. Chanfrau*, 613 So. 2d 600 (Fla. Dist. Ct. App. 1993); cf. *Shupack v. Marcus*, 606 So. 2d 466, 468 (Fla. Dist. Ct. App. 1992) (Schwartz, C.J., dissenting from denial of motion for rehearing en banc) ("It is of controlling significance that the clients' interests are not involved at all in this case. They have fully paid the contingency fee on the recovery, and no one, least of all the appellant Shupack, claims anything more from them. . . . [T]he sole issue is whether Shupack is entitled to any part of the fees already paid the other lawyers."). A client's primary concern in a charging lien action is the total amount of the fee it must pay for legal services, regardless of how participating lawyers choose to split that fee. Indeed, State Contracting was never clearly informed as to how Faro and Ross would split the contingent fee. After settling the patent infringement suit, State Contracting notified the lawyers that it was prepared to pay the one-third contingent fee, and it presumed that Ross and Faro would sort out the proper division of the fee. Ross's arguments largely overlook that fact. Rather, Ross argues that he is entitled to a much larger share of the contingent fee, which would subject State Contracting to fees that would exceed its contractual contingent fee obligation. We conclude that the district court properly rejected Ross's arguments.

A

Ross first argues that he is entitled to 75 percent of the total contingent fee under the engagement letter. We disagree. Four pages of the Florida Bar Rules were

attached to the engagement letter, and the engagement letter provided that Ross and Faro agreed to a "Contingent Fee, as set forth in the current [attached Rules]." The attached rules specify several fee splitting arrangements that are allowable and some arrangements that are mandated under certain circumstances. Although the engagement letter does not reference any of those specific provisions, Ross contends that the engagement letter contemplates that the fee will be split according to Rule 4-1.5(f)(4)(D). That rule was among those attached to the engagement letter, and it provides that "in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another," the lawyer assuming "primary responsibility" for the legal representation shall receive a minimum of 75 percent of the total contingent fee. As the district court explained, however, State Contracting's patent infringement suit is not based on personal injury or property damage. It is better characterized as an action for "damages arising in the commercial litigation context," which is another type of suit referred to in the rules. The comment to the rules specifically notes that Rule 4-1.5(f)(4) (i.e., the 75 percent requirement) does not apply to commercial litigation.

We conclude that the contract does not provide the basis on which the fee was to be split. The general reference in the engagement letter to the Florida Bar Rules does not specify or incorporate by reference any particular division of fees between Ross and Faro. By the terms of the contract, all that State Contracting agreed to was to pay one-third of its recovery as a contingent fee for the legal services provided by Faro

and Ross. Thus, the district court did not err by rejecting Ross's assertion that the engagement letter entitles him to 75 percent of the contingent fee.

B

Ross next argues that he is entitled to the entire contingent fee contemplated in the engagement letter. In support of that argument, Ross points to *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982), and *Adams v. Fisher*, 390 So. 2d 1248 (Fla. Dist. Ct. App. 1980). Ross reasons that under Rosenberg Faro is not entitled to recover any portion of the contingent fee contemplated in Ross and Faro's contract with State Contracting, and that under Adams any fee paid to Faro does not affect Ross's right to recover the entire contingent fee under the contract. Ross's argument would subject State Contracting to a total fee exceeding the contingent fee to which it agreed (i.e., State Contracting would be required to pay Faro the reasonable value of his services, and it would be required to pay Ross one-third of the value of its settlement). The decisions in *Rosenberg* and *Adams* do not support that outcome.

In Rosenberg, a lawyer contracted for a contingent fee but was discharged before the occurrence of the contingency. The Supreme Court of Florida held that "a lawyer discharged without cause is entitled to the reasonable value of his services on the basis of quantum meruit, but recovery is limited to the maximum fee set in the contract entered into for those services." *Rosenberg*, 409 So. 2d at 1017. The court was concerned that if a discharged attorney could recover his contractual contingent fee, then a client who discharged his lawyer might be required to pay two contingent

fees--one to the discharged lawyer and one to a substituted lawyer. That result, the court ruled, would be contrary to the "overriding need to allow clients freedom to substitute attorneys without economic penalty." *Id.* at 1021. Rosenberg did not address the issue of compensation for a substituted attorney; in particular, it did not address the situation in which two lawyers represent a client under a single fee agreement and one of the lawyers is discharged while the case is pending.

In Adams, a Florida court addressed the issue of compensation for a substituted lawyer and concluded that when a client enters into a new contingent fee contract with a substituted lawyer, that lawyer's recovery is not necessarily offset by the quantum meruit obligation the client owes to a discharged lawyer. *Adams*, 390 So. 2d at 1251. Unless the substituted lawyer's contract contemplates such an offset, the client is required to pay "fees in excess of the original contingent fee, once to the discharged attorney in quantum meruit and again to the substituted attorney on a new contingent fee contract." Id. Adams is critically distinguishable from the present case, however, because in this case Ross and State Contracting did not enter into a new contingent fee contract after Faro was discharged. Nor is there any evidence or suggestion by Ross that there was a reformation of the original contingent-fee contract. Rather, based on the evidence of record, the court found that after Faro's discharge the parties continued to operate under the original engagement letter. Under that contract, State Contracting merely agreed to pay one-third of the value of its settlement in exchange for Faro's and Ross's legal services. The engagement letter

thus included any fees owed for Faro's services. We therefore reject Ross's invitation to reform the contract to increase State Contracting's fee obligations beyond the amount to which it initially agreed. The district court properly held that Ross's right to recover must be offset by Faro's recovery.

C

Ross argues that even if his recovery must be offset by Faro's fee, Faro's proper fee is limited to the quantum meruit value of his services, which, according to Ross, is less than the $ 1,315,900 Faro received when Faro settled his attorney fee claim with State Contracting. Thus, Ross argues, he should be entitled to one-third of the value of the settlement less the reasonable value of Faro's services.

The problem with that argument is that the magistrate judge found that Faro and Ross agreed at the outset to split the contingent fee equally and never agreed to a different proportional split of the fee. Under the terms of his agreement, Ross is therefore limited to a one-half share of the total contingent fee, as the district court held. While there might be circumstances in which an attorney in Ross's position could reasonably seek a larger share of the contingency fee notwithstanding his initial agreement to an even split of the fee--such as where his co-counsel abandoned the joint venture or was discharged by the client on the client's own initiative--this is not such a case. To the contrary, the result for which Ross argues would be inappropriate in this case because, as the magistrate judge found, Faro was discharged at Ross's insistence and would not have been discharged otherwise. Moreover, Faro was

discharged in June 2003, after more than seven years of representing State Contracting and less than four months before the global settlement was reached in October 2003. As the magistrate judge observed, it would be inequitable under these circumstances to allow Ross to force the client to discharge Faro, to use Faro's discharge as a ground for avoiding his agreement to split the fee equally with Faro, and then to claim a larger share of the contingent fee for himself.

D

Finally, Ross argues that the "value of the settlement," which was the basis for the contingent fee contemplated in the engagement letter, includes--in addition to the value of any cash settlement--the value of any future royalties stemming from the patents in suit. Based on that interpretation, Ross calculates the value of the settlement at nearly $ 16 million. We disagree with Ross's interpretation of the "value of the settlement."

First, it is unclear whether Ross disputes the magistrate judge's determination that there is ambiguity in the phrase "value of the settlement." His primary argument seems to be that even if there is an ambiguity, the magistrate judge should have resolved that ambiguity based on "well settled Florida contract law that provides that the best evidence of a party's contractual intent is the construction it puts on the agreement through its conduct." As explained above, Ross believes that Faro was entitled to no more than 25 percent of the total contingent fee in this case. Thus, in Ross's view, State Contracting's $ 1.3 million settlement with Faro shows that State Contracting

understood the total "value of the settlement" to be nearly $ 16 million.

That argument is wholly unpersuasive. There is no evidence as to what led State Contracting to settle Faro's charging lien for the amount they agreed upon. There is no reason to assume that the amount Faro was paid in the settlement was in any way based on State Contracting's understanding of the "value of the settlement," and Ross has not pointed to any evidence that Faro's settlement was based on an assumption by State Contracting that the contract limited Faro's fee to 25 percent of the contingent fee.

Ross also argues that the amended engagement letter supports his interpretation of the "value of the settlement." In 1998, Faro and Ross suggested that State Paving Corp. (the previous owner of the patents in suit) should be joined as a plaintiff in the infringement suit. As a result, the engagement letter was amended in March 1998 to add State Paving Corp. as a client. The amended engagement letter notes that "the parties have previously agreed to a formula for the division of net royalties, and other net revenues realized by [State Contracting] from its exploitation and/or enforcement of such rights (e.g., licensing)." Ross argues that the quoted statement refers to the fact that the contingent fee included a percentage of future royalties. The evidence of record, however, shows that the statement refers to a compensation agreement between State Contracting and State Paving Corp. There is no evidence that Ross and State Contracting had "previously agreed to a formula for the division of net royalties," and there is ample evidence supporting the magistrate judge's finding that that language in the

amended engagement letter referred to an agreement between State Contracting and State Paving Corp. Moreover, the amended engagement letter provides that the "fee schedule set forth in the [original] Engagement Letter. . . shall remain in effect and the parties herein reaffirm the acceptance thereof." Thus, to the extent Ross argues that the amended engagement letter modified the parties' original understanding of the meaning of the phrase "value of the settlement," that provision in the amended engagement letter expressly refutes his argument.

Finally, to the extent Ross argues that the phrase "value of the settlement" unambiguously includes future royalty payments, we disagree. A charging lien "will attach only to the tangible fruits of the [legal] services" for which fees are sought. *Correa v. Christensen*, 780 So. 2d 220 (Fla. Dist. Ct. App. 2001). Future royalty payments were not a tangible fruit of State Contracting's settlement. In its settlement agreement with State Contracting, the Florida Department of Transportation merely agreed to list State Contracting's patented design as an acceptable standard for its contractors to use. The agreement provides that if any contractor chooses to use State Contracting's patented design, any royalty fees will be paid by that contractor, and not by the Florida Department of Transportation. Ross has provided no plausible explanation as to how that clause in the settlement agreement amounts to a tangible fruit of the litigation, or how one might value that benefit for purposes of awarding some portion of the benefit as a contingent fee to Ross.

Florida law provides that it is unjust to hold a client

liable for additional attorney fees based on a contract term that is ambiguous. *Arabia v. Siedlecki*, 789 So. 2d 380, 383 (Fla. Dist. Ct. App. 2001) ("An attorney must be clear and precise in explaining the terms of a fee agreement. To the extent the contract is unclear, the agreement should be construed against the attorney."). Here, the evidence of record indicates that at the time the engagement letter was executed, no one-not even Ross-contemplated that the "value of the settlement" included future royalty payments. Indeed, Ross did not propose his current interpretation of the phrase until after the litigation had ended, when he commented to State Contracting that Faro had an "interesting take" on the "value of the settlement" language in the engagement letter. Thus, we conclude that the district court properly limited the value of the settlement to $ 8 million, which was the cash settlement State Contracting received from the Florida Department of Transportation.

V

Finally, Ross contends that the district court erred by determining that State Contracting was the prevailing party in Ross's charging lien litigation and thus awarding attorney fees to State Contracting for its defense of Ross's claim. We affirm the district court's decision in that regard.

The engagement letter contains a fee provision expressly allowing Ross and Faro to recover attorney fees incurred as a result of any dispute pertaining to the engagement letter's fee arrangement. Ross and State Contracting both moved for attorney fees after the district court entered its final judgment in the

charging lien litigation. The district court referred the motions to the magistrate judge, and subsequently adopted the magistrate judge's findings and recommendations on the motions. The magistrate judge held that Florida law required that provision to be read as granting a reciprocal right to recovery of such attorney fees. See, e.g., *Ajax Paving Indus. v. Hardaway Co.*, 824 So. 2d 1026, 1028 (Fla. Dist. Ct. App. 2002). That conclusion seems undisputed here. Florida courts treat such reciprocal provisions just like any contract provision, and thus will enforce the clause (i.e., by determining that one of the two parties prevailed) except in rare instances. In other words, the question is more "who prevailed" rather than "did someone prevail."

Under Florida law, the prevailing party is the "party prevailing on the significant issues in the litigation." *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 810 (Fla. 1992). Here, the magistrate judge determined that the significant issue in Ross's charging lien litigation was the dispute over the meaning of "value of the settlement." Ross contends that the significant issue was whether the engagement letter was an enforceable contract. However, the magistrate judge held that State Contracting's primary theory--both before and during the charging lien litigation--was that the contract was enforceable but that the value of the settlement was limited to the $ 8 million cash settlement. We discern no abuse of discretion in that determination, or in the district court's decision to award attorney fees to State Contracting.

Ross also argues that any award of attorney fees against him should be shared by Faro, since the court

found that they were involved in a joint venture. We disagree. Whether or not Ross and Faro were joint venturers or joint obligees, each pursued his own charging lien, on his own behalf. Faro settled his claim with State Contracting, and Ross pursued his through litigation. Thus, State Contracting's attorney fees stemmed from Ross's efforts to enforce his own charging lien, not from efforts to enforce a charging lien on behalf of any joint venturer with whom he would share his award.

In sum, we affirm the judgment as to the charging lien, and we affirm the district court's award of attorney fees to State Contracting for its defense of Ross's charging lien claim. Each party shall bear its own costs for this appeal.

CONCUR BY: DYK

DISSENT BY: DYK

DISSENT: DYK, Circuit Judge, concurring-in-part and dissenting-in-part.

I join the generally well-reasoned majority opinion except for Parts IV.C and V, from which I respectfully dissent. In part IV, the majority concludes that, even though Faro was discharged, he was still entitled to recover from the client fifty percent of the contingent fees under the original agreement with Ross, rather than the quantum meruit value of his services. In turn, says the majority, Ross is only entitled to recover one-half of the contingent fee.

The Florida cases make clear that in an action against the client (State Contracting) Faro, having been discharged by State Contracting without cause, was entitled to recover only the quantum meruit value of his services. See *Rosenberg v. Levin*, 409 So. 2d 1016, 1017 (Fla. 1982); *Adams v. Fisher*, 390 So. 2d 1248, 1250 (Fla. Dist. Ct. App. 1980). It follows under the Florida cases that Ross, who continued the work, was entitled to recover the remainder of the contingent fee in a suit against the client. See *Adams*, 390 So. 2d at 1251 (finding that where the client discharged the initial attorney, the second attorney was entitled to the contingent fee).

In rejecting this approach, the majority relies on the agreement between Faro and Ross to divide the contingent fee equally. I fail to see how that agreement can change the result under the Florida cases. The Florida cases recognize that contingent fee arrangements often fail to deal explicitly with the possibility that a retained counsel may be discharged. See *Rosenberg*, 409 So. 2d at 1017; *Shupack v. Marcus*, 606 So.2d 466, 467 (Fla. Dist. Ct. App. 1992); *Adams*, 390 So. 2d at 1250. As noted, the default rule in Florida is that when an attorney is discharged without cause, he is entitled to recover only the quantum meruit value of his services in a suit against the client. I see no reason why agreements among counsel as to the division of fees should be governed by a different default rule, and the Florida cases do not suggest that they are. Moreover, the rule adopted in the Florida cases makes eminent sense. For example, here if Faro had been discharge done day after the agreement was reached and after performing six hours of work under it, it would be unfair in the extreme that Faro should

nonetheless receive one-half of the contingent fee when Ross spent years of work fulfilling the service obligations under the agreement with the client. The court in Adams came to a similar conclusion where a client discharged his first attorney, with whom he had a contingent fee agreement, and then hired a second attorney under a separate contingent fee agreement. 390 So. 2d at 1249-50. As to the first attorney's fee, the court held:

Upon discharge, the attorney has no right to collect his contingent fee. His fee is to be determined on a quantum meruit basis. To allow the discharged attorney to collect his contingent fee would be inequitable. It might cause the client to pay an excessive fee without receiving the full benefits of counsel in violation of the Florida Code of Professional Responsibility DR 2-106(A).

Id. at 1250 (internal citation removed) (emphasis added).

Significantly, Faro himself, in seeking dismissal of his charging lien pursuant to the settlement with State Contracting, explicitly agreed that he would only have been entitled to quantum meruit recovery. Reply in Support of Faro's Petition for Disbursement of Settlement Sum from Court Registry (Doc. 503) at 2 ("Florida law allows a discharged attorney on a contingency case to collect only quantum meruit whereas an attorney employed under a contingency contract gets the full contracted fee."); id. at 4.

The majority appears to agree that in some circumstances Ross would be entitled to the contingent

fee less Faro's quantum meruit recovery, but suggests that two circumstances here render that result inequitable, namely the advanced stage of the litigation, and Ross's effort to secure Faro's discharge. I do not read the decision below as resting on these grounds, nor do the Florida cases suggest that the result should turn on such considerations. In any event, the facts here do not suggest that full recovery by Ross is somehow unfair. While only four months work remained, the work that Ross did without Faro's assistance was substantial. After Faro was discharged, Ross handled the appellate proceedings in the case, including an oral argument before this court. Ross was also responsible for preparing the case for trial, on the eve of which, the client decided to settle.

Moreover, the desire to terminate the relationship between Faro and Ross was mutual; they simply found it impossible to work together. Here the magistrate judge found that both Faro and Ross had attempted to persuade the client to discharge the other. Faro, for example, privately met with the client to suggest a replacement for Ross. When that attempt failed, Faro-without the client's approval-sent Ross a letter purporting to discharge Ross. For his part, Ross gave the client an ultimatum: the client would have to either discharge Faro, Ross, or the both of them. That Ross ultimately prevailed in convincing the client to discharge Faro in this situation should have no bearing on the allocation of fees. Under these circumstances, I see no basis for denying recovery of the full contingent fee to Ross less whatever Faro's quantum meruit recover should have been (which amount may be significantly different from the amount that State Contracting agreed to pay Faro in settlement).

In summary, I respectfully dissent from Part IV.C. of the majority opinion. In my view, Ross is entitled to the full contingent fee less any quantum meruit recovery to which Faro was entitled. I would remand for a determination of the correct amount of the fee award. As a result, I also dissent from Part V of the majority opinion, as I would vacate the district court's award of prevailing party fees to State Contracting.

Filed: 8/11/05
CASE NO. 97-7014-CIV-DIMITROULEAS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation,
Plaintiff,

vs.

CONDOTTE AMERICA, INC., a Florida corporation, f/k/a/ RECCHI AMERICA, INC, et al.
Defendants.

ORDER APPROVING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE DENYING CLAIMANT ROSS' MOTION FOR ATTORNEY'S FEES AND COSTS; AND GRANTING, IN PART, PLAINTIFF'S COUNTER-MOTION FOR ATTORNEY'S FEES AND COSTS

THIS CAUSE is before the Court upon Richard S. Ross, Esq.'s Verified Motion for Award of Attorney's Fees and Costs [DE 570], State Contracting & Engineering Corporation's Counter-Motion for Award of Attorney's Fees and Costs [DE 594], and the Report and Recommendation on Richard S. Ross' and State Contracting & Engineering Corporation's Motions for Attorney's Fees and Costs [DE 619], signed by Magistrate Edwin G. Torres on July l, 2005. In reviewing the Report and Recommendation, the Court has considered the Richard S. Ross's July 11, 2005

Objections to the Report and Recommendation [DE 620], and Plaintiff State Contracting & Engineering Corporation's Response to Richard S. Ross' Objections [DE 623]. Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of the entire court record herein, and is otherwise fully advised in the premises.

I. BACKGROUND

On March 1, 2004, Richard S. Ross ("Ross") filed a Motion to Adjudicate His Charging Lien [DE 493]. After conducting a five-day evidentiary hearing, Magistrate Judge Edwin G. Torres ("Magistrate Torres") on October 25, 2004 issued a extensive Findings of Fact and Conclusions of Law [DE 548] as well as a Report and Recommendation [DE 549] that recommended that this Court award Ross a contingent fee in the amount of one-half of one-third of the $8,000,000.00 recovery by State Contracting & Engineering Corporation ("SCEC"), minus the hourly fees advanced to Ross. On March 30, 2005, this Court entered an Order Adopting the October 25, 2004 Report and Recommendation [DE 589] over objections from both Ross and SCEC, thereby granting Ross' Motion to Adjudicate his Charging Lien.

On December 9, 2004, Ross filed his Motion for Award of Attorney's Fees and Costs [DE 570], and on April 29, 2005 SCEC filed its Counter-Motion for Award of Attorney's Fees and Costs [DE 594]. This Court referred both Ross' and SCEC's Motions for Awards of Attorney's Fees and Costs to Magistrate Torres for a Report and Recommendation [DE 590]. On July 1, 2005, Magistrate Torres issued his Report and

Recommendation [DE 619], which recommends that this Court find that SCEC was the prevailing party and award a judgment for attorney's fees and costs totaling $248,404.96 to SCEC.

On July 11, 2005, Ross filed his abjection to the July 1, 2005 Report and Recommendation [DE 620]. In his Objection Ross contends: (1) that he should actually be considered the prevailing party because he succeeded on the significant issue in the litigation-i.e., the existence of a contractual fee agreement; (2) the fee calculation fails to apply the joint venture analysis, and should be reduced by half; and (3) that the Magistrate Judge had no jurisdiction to resolve the parties' post-trial Motions for Attorney's Fees and Costs. On July 25, 2005, SCEC filed its Response to Ross' Objections, in which they argue that the Magistrate correctly: (1) applied the law in determining that SCEC was the prevailing party; (2) determined the fee calculation by applying the lodestar reduction; and (2) had jurisdiction to hear these Motions pursuant to 28 U.S.C. § 636(b)(1)(B) and/or 28 U.S.C. § 636(b)(3). For the reasons expressed below, the Court agrees with the Magistrate and SCEC.

II. DISCUSSION

A. Jurisdiction of Magistrate

Ross now objects, for the first time, to Magistrate Torres' jurisdiction over the post-trial Motions for Attorney Fee's and Costs. According to Ross, Magistrate Torres lacked jurisdiction to hear such Motions because neither party consented to the jurisdiction of the Magistrate to hear such post-trial

motions. The Court must address this objection first, since if Ross is correct that the Magistrate lacked jurisdiction to decide post-trial fee motions, then the July 1, 2005 Report and Recommendation would become moot.

This Court referred the parties' Motions for Attorneys Fees and Costs to Magistrate Torres pursuant to 28 U.S.C. § 636, and the Local Magistrate Rules for the Southern District of Florida. It is common practice for post-trial motions for attorneys fees and costs to be referred pursuant to 28 U.S.C. § 636 to Magistrate Judges for Report and Recommendations. See e.g., Blasland, Bollock & Lee, Inc. v. City of N. Miami, No. 971484CIV-HURLEY, 2001 WL 736006, at * 1 (S.D. Fla. Feb. 7, 2001); Blasber v. U.S., No. 94-1844-CIV-DAVIS, 1997 WL 1038222, at *3 (S.D. Fla. Nov. 18, 1997). Ross fails to provide, and this Court fails to find, authority that would prohibit such a practice. In fact, the Eleventh Circuit has reviewed situations involving post-trial motions for attorney's fees and costs that have been referred to magistrate judges, and has not held that the Magistrate lacks jurisdiction to issue Report and Recommendations under such circumstances. See generally In re Honeywell Corp., 967 F.2d 568 (11th Cir. 1992). Moreover, courts have expressly held that Magistrates have jurisdiction to issue Reports and Recommendations based upon on post-trial motions pursuant to 28 U.S.C. § 636(b)(3). See eg., Callier v. Gray, 167 F.3d 977, 982-84 (6th Cir. 1999). Accordingly, the Court finds that Magistrate Torres did have jurisdiction to issue the July 1, 2005 Report and Recommendation.[1]

B. Prevailing Party

"When parties by contract determine that the prevailing party in any litigation shall be entitled to attorney's fees, the question before the court is not whether fees should be awarded; the issue is which is the prevailing party." Pelican Bay Homeowners Ass,'n. Inc. v. Sedita, 724 So. 2d 684, 685 (Fla. 5th DCA 1999). Here, SCEC and Ross had such a contract. Neither SCEC nor Ross dispute that "in a breach of contract situation, one party must prevail." Lucite Ctr., Inc. *v.* Mercede, 606 So. 2d 492, 493 (Fla. 4th DCA 1992). The standard for determining which party prevailed, and as such which party is entitled to attorney's fees, is "if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought ..... Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). As Magistrate Torres noted, deciding which party prevailed is not a simple task, because "it is results, not procedure, which govern the determination." Smith v. Adler, 596 So. 2d 696, 697 (Fla. 4th DCA 1992). After applying these standards, Magistrate Torres concluded that "the crux of the dispute throughout the charging lien litigation was the numerical valuation of Ross's recovery - an issue on which Ross did not prevail." (July l, 2005 R&R [DE 619] at p. 7). Accordingly, Magistrate Torres recommends that this Court find SCEC to be the prevailing party.

In his Objection, Ross posits that he, rather than SCEC, is actually the prevailing party. According to Ross, Magistrate Torres erred in: (1) not applying the Hensly standard, which if applied would result in a determination that Ross was the prevailing party; (2) focusing on the recovery amount to establish which party prevailed; and (3) relying on the "prevailing party" definition from mechanics lien law, as well as the

October 17, 2003 letter. This Court disagrees.

First, Magistrate Torres correctly applied the Hensley standard in concluding that the significant issue in this case was the recovery amount, rather than the existence of a contractual agreement. It is the results, not the procedure that govern which party prevails. Smith, 596 So. 2d at 697. The central dispute underlying the charging lien litigation was how much Ross was going to recover, not whether a contract existed. The Court's determination that an enforceable contract existed was merely the means, i.e., procedure, for determining the results, i.e. how much money Ross was entitled to collect. Moreover, Ross ignores that the mere determination that a contract existed did not resolve his charging lien. Rather, after concluding that contract existed, this Court was I required to determine how much recovery his was entitled to under the contractual agreement. Ross argued that he was entitled to recover one-third of "the present value of SCEC's future royalties derived on its patents, as well as the present cash component ... [or one-third of] no less than $15,950,303.00." State Contracting & Eng'g Corp. v. Condotte Am., Inc., 368 F. Supp. 2d 1296, 1303-04 (S.D. Fla. 2005). SCEC argued that Ross was entitled to one-half of one-third of present cash recovery minus the hourly fees already advanced to Ross. The Court agreed with SCEC, thus SCEC prevailed on the ultimate issue of how much Ross was entitled to recover under his charging lien. Simply because Ross disagrees with the conclusion does not mean that Magistrate Torres did not apply the appropriate standard correctly.

Second, Ross contends that the amount of

recovery should not determine which party prevailed. Instead, Ross asserts the prevailing party is the party that recovers any amount of money; and since he recovered money he should be considered the prevailing party. See Malagon v. Solari, 566 So. 2d 352, 353 (Fla. 4th DCA 1990). However, "simply because a party has obtained some economic benefit as a result of the litigation, does not necessarily mean that the party has succeeded on the major issue in the case." Zhang v. D.B.R. Asset Mgmt_, 878 So. 2d 386, 387 (Fla. 3d DCA 2004). As discussed above, the prevailing party is the party that succeeds on the significant issue in bringing or defending an action. See Moritz v. Hoyt Enters., Inc., 604 So. 2d 807, 809-10 (Fla. 1992). Here, Magistrate Torres correctly concluded that the significant issue in this litigation was the amount of recovery Ross was entitled to receive under his charging lien. Ross' citation to cases in which courts found the significant issue to be which party breached the contract, are inapposite to the present matter. See e.g., Green Co., Inc. v. Kendall Racquetball Inv., 658 So. 2d 1119 (Fla. 3d DCA 1995). The existence of a contract, or any breach thereof, was not the significant issue in the charging lien litigation. Rather, as discussed above, the amount of recovery obtained by Ross was the significant issue and SCEC prevailed on this issue. Consequently, in this matter, Magistrate Torres was not in error when finding that the amount of recovery determines the prevailing party.

Third, the Court finds Ross' arguments regarding Magistrate Torres' use of mechanics lien cases and reliance on the October 17, 2003 letter to be without merit. First, Magistrate Torres' inclusion of mechanic lien cases in the July l, 2005 Report and

Recommendation was done its order to distinguish those cases from the present matter. In fact, it was Ross that originally introduced the mechanics lien cases in this matter in an effort to support his argument that he should be considered the prevailing party. Magistrate Torres correctly noted that "this is not a mechanic's lien case." (July 1, 2005 Report and Recommendation [DE] at p. 10 n.1.) Nevertheless, Magistrate Torres discussed the mechanics lien cases to demonstrate their inapplicability to this matter, as well as to show that Ross would not be the prevailing party even if the mechanic lien case law was applicable. As such, Magistrate Torres did not err by addressing the mechanics' lien cases that Ross himself introduced into this matter. Second, Magistrate Torres' use of the October 17, 2003 letter was not improper. The facts support a conclusion that the October 17, 2003 constituted an offer to pay Ross his share of the contingent fee. Moreover, it is indisputable that Ross did not accept SCEC's offer, but instead elected to file a charging lien. Additionally, contrary to Ross' argument, the letter was not an offer of settlement, but was an attempt by SCEC to tender Ross the money they believed he was due. Accordingly, the Court finds that Magistrate Torres' consideration of the October 17, 2003 letter did not violate Federal Rule of Evidence 408.

C. Fee Calculation

Lastly, according to Ross, Magistrate Torres erred in determining the fee calculation. Ross first argues that Magistrate Torres failed to apply joint venture principles to the fee calculation. However, as Magistrate Torres stated, "Ross fails to note that SCEC

reduced its fees and costs by half for expenses incurred prior to his joint venturer's settlement . . . ." (July 1, 2005 Report and Recommendation [DE] at p. 20.) This reduction by SCEC makes Ross' joint venture argument moot as to expenses prior to Faro's settlement, since these expenses have already been reduced by half. Additionally, as Magistrate Torres stated, "once Faro settled his charging lien action ... and Ross continued to advance his charging lien motion alone, the joint venture issue was no longer relevant." (Id.) Contrary to Ross' contention, it was Ross alone, and not any joint venture, that was responsible for all the fees incurred during the charging lien litigation after Faro's settlement. As such, since Magistrate Torres has only recommended that Ross be held responsible for the fees incurred by his action and not that of Faro, this Court finds that Magistrate Torres did not err in refusing to reduce the fee by an additional fifty-percent (50%).

Second, Ross contends that there should be an eighty-percent (80%) reduction in the fee, because the five-day hearing before Magistrate Torres could have been one-day if SCEC had admitted the validity of the fee agreement. This argument is meritless and does not factor in Ross' own actions that prolonged the hearing, e.g. arguing that the "value of settlement" term includes future royalties derived from SCEC's patents. Moreover, the Court finds that Magistrate Torres fifteen-percent (15%) reduction to be equitable under the circumstances.

III. CONCLUSION

Accordingly, for the foregoing reasons, it is

ORDERED AND ADJUDGED as follows:

1. The Report and Recommendation [DE 620] of Magistrate Judge Edwin G. Torres, dated July 1, 2005, is hereby ADOPTED;

2. Claimant Richard S. Ross, Esq.'s Motion for Attorney's Fees and Costs [DE 570] is herebv DENIED;

3. Plaintiff state Contracting & Engineering Corporation's Counter-Motion for Attorney's Fees and Costs [DE 594] is hereby GRANTED, in part;

4. Judgment for Attorneys Fees and Costs is hereby entered in favor of State Contracting & Engineering Corporation and against Richard S. Ross, Esq. in the amount of $248,404.96, consisting of 239,547.01 in Attorney's Fees and $8,857.95 in Costs;

5. This judgment of $248,404.96 shall bear interest at the rate of 3.84% per annum from the date of this order, for which let execution issue

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida.

Footnote

Fn1Even assuming *ajguendo that* jurisdiction was lacking here, Ross nevertheless waived any objection on this ground by participating in the proceeding before the Magistrate and failing to make his opposition known until after the Magistrate issued his Report and Recommendation. Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975); see also McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 925 F.2d 853 (5th Cir. 1991). The Eleventh Circuit, in Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11 th Cir. 1981) (en banc), adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October l, 1981.

CASE NO. 97-7014-CIV-DIMITROULEAS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation,
Plaintiff,

vs.

CONDOTTE AMERICA, INC., a Florida corporation, f/k/a/ RECCHI AMERICA, INC, et al.
Defendants.

May 27, 2005, Decided
May 27, 2005, Filed

COUNSEL: For STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation, plaintiff: Glenn Neil Smith, William Grant McCormick, Ruden McClosky Smith Schuster & Russell, Fort Lauderdale, FL; Mike Albert Piscitelli, Vezina Lawrence & Piscitelli, Fort Lauderdale, FL; Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For THE HARDAWAY COMPANY, a Georgia corporation, defendant: Charles David Harper, Foley & Lardner, Tampa, FL; John Harrison Rains, III, Tampa, FL.

For NORTHERN TRUST BANK OF FLORIDA, N.A., garnishee: Bruce Jacobs, Camner Lipsitz & Poller, Coral Gables, FL.

For THE HARDAWAY COMPANY, counter-claimant: Charles David Harper, Foley & Lardner, Tampa, FL; John Harrison Rains, III, Tampa, FL.

For STATE CONTRACTING & ENGINEERING CORPORATION, counter-defendant: Richard Stuart Ross, Donna M. Ballman, Davie, FL.

For STATE PAVING CORPORATION, a Pennsylvania corporation, plaintiff: Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For STATE CONTRACTING & ENGINEERING CORPORATION, counter-defendant: Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For STATE PAVING CORPORATION, counter-defendant: Richard Stuart Ross, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

JUDGES: WILLIAM P. DIMITROULEAS, United States District Judge.

OPINION BY: WILLIAM P. DIMITROULEAS

OPINION:

ORDER GRANTING, IN PART, MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court upon Charging Lien Claimant's Richard S. Ross, Esq.'s Motion for Reconsideration of Omnibus Order Approving Report and Recommendation and Discharging Charging Lien

[DE 591] and Plaintiff State Contracting & Engineering Corporation's Motion for Leave to Respond on the Merits to Ross' Motion for Reconsideration [DE 604-2]. The Court has carefully considered the motion, Plaintiff State Contracting & Engineering Corporation's Response [DE 604-1], Ross' Reply [filed herein May 26, 2005], and is otherwise fully advised in the premises.

I. BACKGROUND

On March 31, 2005 the Court entered an Omnibus Order Approving Report and Recommendation and Discharging Charging Lien [DE 589] in the above-styled matter. On April 11, 2005, Charging Lien Claimant Richard S. Ross, Esq. filed the instant Motion for Reconsideration of the Court's March 31, 2005 Omnibus Order. Ross' Motion argues that reconsideration is necessary because: (1) the Court's March 31, 2005 Order found that Ross' November 17, 2004 Objections to Magistrate Torres' Report and Recommendation were untimely filed; (2) it was manifestly unjust for the Court not to consider Ross' Notice of Filing Record Citations and Supplementation in Support of His Objections to Magistrate's Report and Recommendation [DE 587]; (3) the Court erred by reducing Ross' fee by fifty-percent; and (4) the Omnibus Order should expressly include the Report and Recommendations' statement that Ross is entitled to the pro-rata share of interest earned on the funds in the court registry.

Plaintiff State Contracting & Engineering Corporation (SCEC) counters that (1) Ross' Objection to the finding that Ross' November 17, 2004 Objections were untimely filed is moot since the Court considered these Objections in the Omnibus Order despite finding

them untimely; (2) that it was not manifest error by the Court to not consider Ross' Notice of Filing Record Citations and Supplementation in Support of His Objections to Magistrate's Report and Recommendation; (3) that Ross is improperly rearguing the issue of whether his fee should be reduced by fifty-percent; and (4) that both parties should receive their share of interest earned on the funds in the court registry.

II. DISCUSSION

"The 'purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.'" *Burger King Corp. v. Ashland Equities, Inc., 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002)* (quoting *Z.K. Marine Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992))*. Three major grounds justify reconsideration: "(1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." Id. (citing *Offices Togolais Des Phosphates v. Mulberry Phosphates, Inc., 62 F. Supp. 2d 1316, 1331 (M.D. Fla. 1999)*; *Sussman v. Salem Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla 1994))*. For a court to reconsider its prior judgment the moving party must present facts or law of a "strongly convincing nature" that would induce a court to reverse its prior decision. Id. (citing *Sussman, 153 F.R.D. at 694*).

Reconsideration of a previous order is an extraordinary remedy that is used sparingly to prevent the court from being "repeatedly called upon to backtrack through the paths of litigation which are often laced with close questions." *Id. at 1370* (citing

Sussman, 153 F.R.D. at 694). "Motion[s] for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made." *Z.K. Marine Inc., 808 F. Supp. at 1563*. Rather a motion to reconsider is appropriate when the "court has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension." Id. (citing *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)*; *Moog, Inc. v. United States, 1991 U.S. Dist. LEXIS 17348, No. 90-215E, 1991 WL 255371, *1 (W.D.N.Y. Nov. 21, 1991))*.

Ross' first argument is that the Omnibus Order should be reconsidered because the Court found that Ross' November 17, 2004 Objections to Magistrate Torres' Report and Recommendation were untimely filed. [*6] According to Ross, this finding is inaccurate because the November 17, 2004 Objections were filed timely but incorrectly stamped untimely by the Clerk's office. This argument is moot, however, since the Omnibus Order stated that despite the apparent untimeliness of Ross' November 17, 2004 Objections the Court would nevertheless consider these Objections in the interests of justice. Accordingly, the Court will not reconsider its ruling in the Omnibus Order regarding the November 17, 2004 Objections.

Second, Ross argues that it was manifestly unjust for the Court to not consider his Notice of Filing Record Citations and Supplementation in Support of His Objections to Magistrate's Report and Recommendation. According to Ross, the untimeliness of these Objections should be attributed to the Court

reporter's inability to produce an expedited transcript, and thus he should not be penalized for the delay. However, even if Ross did experience problems obtaining the transcripts from the Court reporter, the majority of the blame for the inordinate delay rests with Ross and no one else. Ross waited seven months to request these transcripts from the Court reporter, and has not provided the Court with a reason to justify his excessive delay. This delay is the result of Ross' actions alone, and justifies the Court's decision to not consider Ross' Notice of Filing Record Citations and Supplementation in Support of His Objections to Magistrate's Report and Recommendation. Accordingly, the Court does not find that there was manifest injustice in its decision not to consider Ross' Notice of Filing.

Ross' third argument for reconsideration is that the Court erred by reducing Ross' fee by fifty-percent. Ross argues that under Florida law he is entitled to a full one-third of the $ 8,000,000.00 cash settlement. This is the very same argument that Ross presented in his Objections to the Magistrate's Report and Recommendation. In other words, Ross is attempting to reargue the exact issue rejected by the Court in its Omnibus Order. Ross offers no valid basis for the Court to reconsider its previous holding on this issue. Accordingly, the Court will not reconsider the issue of whether Florida law prevents Ross' fee from being reduced by fifty percent.

Finally, Ross maintains that the Report and Recommendation held that he is entitled to a pro rata share of interest earned on the funds in the Court registry. While the Report and Recommendation did state that Ross was entitled to a pro rata share of the

interest, the Court's Omnibus Order was silent on the issue of interest.[1] Accordingly, the Court finds that it erred in failing to expressly include language regarding Ross' entitlement to a pro rata share of the interest earned on the funds in the Court registry in its Omnibus Order.

III. CONCLUSION

Accordingly it is ORDERED AND ADJUDGED as follows:

1. Charging Lien Claimant's Richard S. Ross, Esq.'s Motion for Reconsideration of Omnibus Order Approving Report and Recommendation and Discharging Charging Lien [DE 591] is hereby GRANTED, in part.

2. The Court hereby AMENDS its Omnibus Order Approving Report and Recommendation and Discharging Charging Lien [DE 589] to expressly adopt the Magistrate's Report and Recommendation finding that Ross is entitled to his pro rata share of interest earned on the funds deposited in the court registry;

3. SCEC's Motion for Leave to Respond on the Merits to Ross' Motion for Reconsideration [DE 604-2] is hereby GRANTED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 27 day of May, 2005.

WILLIAM P. DIMITROULEAS

United States District Judge

Footnotes

n1 SCEC contends that both parties are entitled their pro rata share of the interest earned on the funds in the Court registry. While this may be true, the Report and Recommendation in question only concerned Ross' charging lien and not the distribution of the funds in the Court registry belonging to SCEC. Accordingly, whether SCEC is entitled to a pro rata share of the interest earned on the funds in the Court registry is a matter more appropriately dealt with in a separate motion.

CASE NO. 97-7014-CIV-DIMITROULEAS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation,
Plaintiff,

vs.

CONDOTTE AMERICA, INC., a Florida corporation, f/k/a/ RECCHI AMERICA, INC, et al. Defendants.

March 30, 2005, Decided

COUNSEL: For STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation, plaintiff: Glenn Neil Smith, William Grant McCormick, Ruden McClosky Smith Schuster & Russell, Fort Lauderdale, FL; Mike Albert Piscitelli, Vezina Lawrence & Piscitelli, Fort Lauderdale, FL; Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For THE HARDAWAY COMPANY, a Georgia corporation, defendant: Charles David Harper, Foley & Lardner, Tampa, FL; John Harrison Rains, III, Tampa, FL.

For NORTHERN TRUST BANK OF FLORIDA, N.A., garnishee: Bruce Jacobs, Camner Lipsitz & Poller, Coral Gables, FL.

For THE HARDAWAY COMPANY, counter-claimant: Charles David Harper, Foley & Lardner, Tampa, FL; John Harrison Rains, III, Tampa, FL.

For STATE CONTRACTING & ENGINEERING CORPORATION, counter-defendant: Richard Stuart Ross, Donna M. Ballman, Davie, FL.

For STATE PAVING CORPORATION, a Pennsylvania corporation, plaintiff: Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For STATE CONTRACTING & ENGINEERING CORPORATION, counter-defendant: Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For STATE PAVING CORPORATION, counter-defendant: Richard Stuart Ross, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

JUDGES: WILLIAM P. DIMITROULEAS, United States District Judge.

OPINION BY: WILLIAM P. DIMITROULEAS

OPINION:

OMNIBUS ORDER APPROVING REPORT AND RECOMMENDATION AND DISCHARGING CHARGING LIEN

THIS CAUSE is before the Court upon the Report and Recommendation on Richard S. Ross' Notice of Filing Charging Lien [DE 548], signed by Magistrate

Edwin G. Torres on October 25, 2004. In reviewing the Report and Recommendation, the Court has considered the October 25, 2004 Findings of Fact and Conclusions of Law [DE 549] of Magistrate Judge Edwin G. Torres, the October 26, 2004 Supplement to the Report and Recommendation [DE 551] of Magistrate Judge Torres, Magistrate Torres' November 9, 2004 Order Denying Ross' Motion for Reconsideration [DE 556], Ross' Objections to the Report and Recommendation [DE 557], Plaintiff's Objections to the Magistrate's Report and Recommendation [DE 552], Ross' Response to the Plaintiff's Objections to the Magistrate's Report and Recommendation [DE 560], Plaintiff's Response to Ross' Objections to the Magistrate's Report and Recommendations [DE 565], and Plaintiff's Motion for Enlargement of Time to File Amended Objections and to Respond to Ross' Notice of Filing Citations and Supplementation in Support of his Objections to the Magistrate's Report and Recommendation [DE 588]. Pursuant to *28 U.S.C. § 636(b)(1)(C)*, the Court has conducted a *de novo* review of the entire court record herein, and is otherwise fully advised in the premises.

I. BACKGROUND[1]

On October 25, 2004, Magistrate Judge Edwin G. Torres issued a Report and Recommendation ("R&R') on Richard S. Ross' Motion and Memorandum of Law to Adjudicate his Charging Lien [DE 548]. In that R&R, Magistrate Torres found, when sitting in equity, (1) an express or implied contract between Richard S. Ross ("Ross") and Plaintiff State Contracting & Engineering Corporation ("SCEC"); (2) an express or implied understanding that payment to Ross was contingent upon and would be paid from the recovery obtained by SCEC in the above styled matter; (3) that SCEC has

disputed the amount of Ross' fee under the contract; and (4) that Ross had timely filed a notice of lien. Additionally, Magistrate Torres found that Ross is entitled to a contingent fee payable from SCEC's recovery in the above-styled matter in the amount of $ 1,094,483.34.[2] Accordingly, Magistrate Torres recommends that this Court grant Ross' Motion to Adjudicate his Charging Lien [DE 493], and discharge with prejudice Ross' January 7, 2003 Charging Lien [DE 446].

II. SCEC'S MOTION FOR ENLARGEMENT OF TIME TO FILE AMENDED OBJECTIONS

On October 25, 2004, Magistrate Torres entered his R&R [DE 548] on Richard S. Ross, Esq.'s Motion and Memorandum of Law to Adjudicate his Charging Lien [DE 493]. The next day, on October 26, 2004, Magistrate Torres entered a Supplement to the R&R [DE 550], which notified the parties that they had ten business days from the date of the R&R to file written objections. The October 26, 2004 Supplement further informed the parties that a failure to timely object would bar the parties from a *de novo* determination by this Court of an issue covered by the R&R and would bar the parties from attacking the factual findings accepted or adopted by this Court. Additionally, the October 26, 2004 Supplement notified the parties that no extension of time would be given unless the motion for an extension was accompanied by a motion for reconsideration or clarification of the R&R or Findings of Fact and Conclusions of Law.

SCEC filed its Objections to the Magistrate's R&R [DE 552] on November 4, 2004. On November 5, 2004, Ross filed a Motion for Reconsideration of the R&R to

Adjudicate Richard Ross' Charging Lien [DE 553]. On the same day, Ross filed a Motion for Enlargement of Time Within Which to File Objections to the R&R [DE 554] that requested a ten day extension from the date Magistrate Torres ruled on the Motion for Reconsideration in which to file objections to the R&R. On November 8, 2004, Magistrate Torres granted Ross' Motion for Extension of Time [DE 555], and on November 9, 2004 Magistrate Torres denied Ross' Motion for Reconsideration [DE 556]. In the November 9, 2004 Order Denying Ross' Motion for Reconsideration [DE 556, p. 4] Magistrate Torres informed the parties that the deadline for filing objections or amended objections to the R&R would be November 16, 2004. The November 9, 2004 Order again notified the parties that a failure to timely object would bar the parties from a *de novo* determination by this Court of an issue covered by the R&R and would bar the parties from attacking the factual findings accepted or adopted by this Court on appeal. Ross filed his Objections to the Magistrate's R&R [DE 557] on November 17, 2004.[3]

On March 1, 2005, almost four months after the November 16, 2005 deadline for objections and amended objections, Ross filed a Notice of Filing Record Citations and Supplementation in Support of His Objections to Magistrate's R&R [DE 587]. In essence, this Notice attempts to amend Ross' November 17, 2004 Objections to Magistrate Torres' R&R [DE 557] by including specific record citations as well as the specific basis for each of Ross' objections to the Magistrates' Findings of Fact [DE 549].[4] On March 16, 2005, SCEC filed its Motion for Enlargement of Time to File Amended Objections and to Respond to

Ross' March 1, 2005 Notice [DE 588]. In the Motion, SCEC requests the opportunity to file its own Amended Objections as well as to responding to Ross' amendments.

When a party files timely and specific objections to a Magistrate's finding of facts district courts have an obligation to conduct a *de novo* review of the record with respect to that factual issues. *LoConte v. Dugger, 847 F.2d 745, 749-50 (11th Cir.), cert. denied, 488 U.S. 958, 109 S. Ct. 397, 102 L. Ed. 2d 386 (1998).* Here, Magistrate Torres' November 9, 2004 Order notified the parties that the deadline for objections and amended objections to the R&R was November 16, 2004. As discussed above, both parties filed timely Objections that the Court will consider below. However, the recent, yet dilatory, attempts by both parties to amend their Objections will not be considered by the Court.

The parties' long-belated efforts to amend come four months after the November 16, 2004 deadline. During that four month period neither party requested leave of this Court to amend its original Objections, until exactly four months after the deadline.[5] The Court finds the delay inexcusable. While minor procedural violations will be tolerated, the delay in question here amounts to a causal disregard for Court imposed deadlines which will not be tolerated. See generally *Ritacca v. Abbott Labs., 203 F.R.D. 332 (N.D. Ill. 2001)*(holding that minor lapses are tolerated by courts but inexcusable and unjustified delay will not be tolerated). As such, the Court will not consider Ross' March 1, 2005 Notice of Filing Record Citations and Supplementation in Support of His Objections to

Magistrate's R&R [DE 587]; and will deny SCEC's Motion for Enlargement of Time to File Amended Objections and to Respond to Ross' March 1, 2005 Notice [DE 588].

III. ROSS' OBJECTIONS

On November 17, 2004, Ross filed his Objections to the Magistrate's R&R [DE 557] wherein he made the following objections: (1) that under the joint venture analysis employed by Magistrate Torres, the venture is entitled to receive the full contracted fee; (2) that Magistrate Torres erred in conducting an accounting of the fee split between Ross and John H. Faro, Esq. ("Faro"); (3) pursuant to *Federal Rule of Civil Procedure 59*, SCEC should not be allowed a second chance to provide evidence of litigation costs it incurred; and (4) Magistrate Torres erred in limiting the value of the settlement to only the present cash component. Additionally, Ross raises challenges to Magistrates Torres' Findings of Fact in paragraphs 20, 27-31, 36, 38-40, 46, 53, 55-57, 59, 60, 62-64, 66, 75, 81-82, 87, 89, 90, and 93.

A. Ross' Objections to Magistrate Torres' Findings of Fact

The form, timing and content of objections to a Magistrate Judge's R&R are governed by *28 U.S.C. § 636(b)* and Local Magistrate Rule 4(b). According to *28 U.S.C. § 636(b)(1)*, "within ten days after being served with a copy [of the R&R], any party may serve and file written objections to such proposed findings and recommendations as provide by rules of court." Local Magistrate Rule 4(b) demands that written objections "shall specifically identify the portions of the proposed findings, recommendations or report to which objection

is made, the specific basis for such objections, and supporting legal authority." S.D. Fla. L.R. 4(b). As such, it is incumbent upon the parties filing objections to an R&R to specifically identify those findings objected to and the specific basis for such objections. *Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir.), cert. denied, 488 U.S. 983, 109 S. Ct. 534, 102 L. Ed. 2d 566 (1988).* If an objection fails to identify the specific findings or a specific basis the district court need not consider it. Id.

Here, Ross' objections to Magistrate Torres' Findings of Fact prove to be inadequate under the standards established by *28 U.S.C. § 636(b)(1)* and Local Magistrate Rule 4(b). n6 Ross' objections are inadequate because they lack the specificity required under the law. For example, Ross objects to the Findings of Fact by generally declaring that the finding is "contrary to the record evidence, including the testimony of" certain individuals[7] or merely "contrary to record evidence."[8] Such objections fail to specifically identify the portions of the record or witness testimony that support the objection. Ross' failure to timely obtain the necessary transcripts should not burden SCEC or the Court with further delays, which would result if the Court were to consider Ross' four month-late supplement. Accordingly, the Court finds Ross' objections to Magistrate Torres' Findings of Fact to be legally insufficient.

B. Ross' Objection to the Joint Venture Not Receiving the Full Contracted Fee

In the R&R dated October 25, 2004, Magistrate Torres found that Faro and Ross were in effect joint ventures under Florida law. Employing the law of

partnerships, which applies to joint ventures, Magistrate Torres further found that Faro's discharge did not relieve SCEC from its obligations to Ross, the surviving member of the joint venture, under the fee agreement. Under this analysis Magistrate Torres held that Ross was in charge of winding up the affairs of the joint venture's purpose -- i.e., the representation of SCEC through judgment or settlement-and in doing so Ross remained accountable to Faro for any loss suffered or profit gained by their joint venture. Magistrate Torres valued the total amount of SCEC's recovery to be $ 8,000,000.00, of which the joint venture was owed one-third in a contingent fee, or $ 2,666,666.67. However, instead of awarding the entire amount of the contingency fee to Ross, Magistrate Torres reduced Ross' recovery by half based on a finding that Ross and Faro had agreed to split the fee equally. After further subtracting $ 238,850.00 in hourly fees previously paid to Ross, Magistrate Torres concluded that Ross was entitled to received $ 1,094,483.34.

In his Objection to the R&R, Ross contends that Magistrate Torres erred in reducing the continency fee award by half. According to Ross, as the surviving member of the joint venture he is entitled to the full contingency fee award of $ 2,666,666.67. The Court finds Ross' argument to be misplaced. The matter before Magistrate Torres was that of Ross' Motion and Memorandum of Law to Adjudicate his Charging Lien [DE 493], not the adjudication of a joint venture's charging lien. Magistrate Torres was charged with determining the amount, if any, Ross was entitled to from his former client. In preforming this task it was necessary to first determine how much Ross and Faro

were due under the fee agreement that existed between their "joint venture" and SCEC. However, to stop at this step in the process, as Ross desires, would have prematurely ended inquiry, since the task before Magistrate Torres was to determine the sum owed to Ross-not the sum owed to Ross and Faro. To accomplish this task, it was incumbent upon Magistrate Torres to proceed further and determine how much of that contingency fee Ross was entitled to receive. Magistrate Torres concluded, from Ross' own testimony, that there was a verbal agreement between Faro and Ross that the contingency fee would be split equally. Thus, this Court finds that Magistrate Torres did not err when finding that Ross was entitled to half of the contingency fee award, rather than the full contingency fee award.

C. Ross' Objection to Splitting the Fee Between Himself and Faro

In his Objections to the R&R, Ross also asserts that Magistrate Torres erred in conducting an accounting of the fee split between himself and Faro. According to Ross, Magistrate Torres exceeded the scope of this Court's October 31, 2003 referral by adjudicating a non-existent claim for an accounting. Additionally, Ross asserts, in the alternative, that if Magistrate Torres had the authority to account for a fee split, the Magistrate nevertheless erred in: (1) failing to include "additional profits" received by Faro in the total contingency fee award, and (2) rewriting the fee agreement to determine that the Faro and Ross had agreed to split the fee equally. The Court disagrees with Ross on each account.

First, as explained more fully in the Court's handling of the previous objection, the task asked of Magistrate Torres in this matter was to adjudicate Ross' charging lien. Nothing in the record supports a conclusion that Magistrate Torres did anything more than determine what amount of money was owed to Ross by SCEC. That was the task asked of the Magistrate, and that was the task that he preformed. As such, this Court finds that Magistrate Torres did not preform an accounting in this matter.

Second, Ross' contention that Faro's settlement should have been included in the total contingency fee award is misplaced. Ross' argument again misconstrues the task that was referred to Magistrate Torres. As explained more fully in the response to the previous objection, Magistrate Torres was referred the task of adjudicating Ross' charging lien, not the adjudication of a charging lien from the "joint venture" of Ross and Faro. As such, the resolution of Faro's charging lien through a separate settlement agreement should have no effect upon the adjudication of Ross' charging lien. Accordingly, Magistrate Torres acted properly in not considering in Faro's settlement when determining Ross' charging lien.

Third, Magistrate Torres did not rewrite the fee agreement in determining that Faro and Ross agreed to split the fee equally. There is no doubt that the Florida Bar standard contingent fee schedule was incorporated into the fee agreement in this matter. Ross contends that the inclusion of *Rule 4-1.5(f)(4)(D)* should result in awarding himself, as the lawyer assuming primary responsibility, no less than 75% of the total contingency fee. Ross' desired result, however, ignores two critical factors. First, and

foremost, Ross testified that he and Faro had a verbal agreement that the contingency fee would be split equally. Second, the inclusion of *Rule 4-1.5(f)(4)(D)* would also have incorporated *Rule 4-1.5(f)*'s language that limits the application of that rule to representation in an "action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another. . . ." *Florida Bar Rules of Professional Conduct 4-1.5(f)*. In other words, the incorporation of *Rule 4-1.5(f)* would have made it clear that *Rule 4-1.5(f)* was not applicable to commercial cases like the one in dispute in this matter. Based upon this evidence Magistrate Torres correctly concluded that the intent of Faro and Ross was to divide the fee equally. Therefore, Magistrate Torres did not "rewrite" the agreement as Ross suggests.

D. Ross' Objection to Allowing SCEC a Second Opportunity to Provide Evidence of Litigation Costs

In the R&R, Magistrate Torres found that the contingent fee should only be applied to the net recovery of SCEC. However, Magistrate Torres noted that there was no evidence establishing the amount of litigation costs incurred by SCEC, which could be used to determine the net recovery. Thus, Magistrate Torres applied the contingency fee to the gross recovery of SCEC, but invited SCEC to file a subsequent motion supplementing the record with a statement of its litigation costs prior to settlement. Ross objects to Magistrate Torres' invitation to SCEC to supplement the record on the grounds that: (1) such a motion for reconsideration is an improper vehicle to present evidence that could have been raised earlier; and (2) if SCEC supplements the record, then Ross would

improperly bear all the burden of the litigation expenses.

The Court finds Ross' arguments persuasive. First, courts have consistently held that a motion for reconsideration is not to be used as a means to present evidence that should have been raised at the time the original motion was decided. See, e.g., *Burger King Corp. v. Ashland Equities, Inc., 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002); Z.K. Marine Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992).* Here, it would appear that the pre-settlement litigation costs incurred by SCEC should have been available for submission at the time the parties submitted their evidence to Magistrate Torres for the adjudication of Ross' charging lien. Second, if SCEC is allowed to supplement the record, Ross' contention that he should only bear half the litigation costs is arguably correct. Nevertheless, SCEC has not as of the date of this Order attempted to supplement the record with evidence of its litigation costs prior to settlement. When, and if, SCEC does so, Ross' objections may have validity. However, until then, Ross' objection is premature.

F. Ross' Objection to Limiting the Value of the Settlement to Present Cash

Finally, Ross objects to Magistrate Torres' determination that the "value of settlement" should be limited to the present cash component of the settlement. In particular, Ross contends that the "value of the settlement" must include the present value of SCEC's future royalties derived on its patents, as well as the present cash component. Ross hypothesizes that the true "value of the settlement," when including

both present and future value, comes to no less than $ 15,950,303.00;[9] a number considerably larger than the $ 8,000,000.00 cash settlement received in this matter. However, in the R&R Magistrate Torres restricted the "value of the settlement" to the $ 8,000,000.00, since that amount was the only tangible evidence of what Faro and Ross procured for SCEC in this matter. The Court agrees with Magistrate Torres.

Courts have consistently held that a charging lien should only attach to "tangible fruits" of a lawyer's services. See, e.g., *Correa v. Christensen, 780 So.2d 220, 220-21 (Fla. 5th DCA 2001)* (citing *Sinclair, Louis, Siegel, Heath, Nussbaum, & Zavertnik, P.A. v. Baucom, 428 So.2d 1383 (Fla. 1983))*. Based upon this principal courts have further held that an attorney's charging lien cannot attach to property that is not before the court. *Cole v. Kehoe, 710 So.2d 705, 706.* At this time, the only tangible evidence of the property recovered by Faro and Ross for SCEC is the $ 8,000,000.00 settlement. Moreover, speculation as to what future benefit, if any, SCEC may receive cannot produce the tangible evidence required for adjudication of a charging lien. Accordingly, Magistrate Torres was correct to limit the "value of the settlement" to the $ 8,000,000.00 settlement figure.

Additionally, the evidence does not support Ross' contention that the contigent fee should include the value of future royalties. SCEC never expressly or implicitly agreed to a definition of "settlement" or "recovery" that would allow Ross to include the present value of SCEC's future royalties in the contingent fee. Rather, the evidence demonstrates that Ross did not even discuss that the contingent fee should apply to future royalties until just before the case was settled.

As such, since these future royalties were not contracted for in the agreement, Ross' charging lien may not now attach to this property. See, e.g., *Scutieri v. Estate of Revitz, 829 F. Supp. 387, 391 (S.D. Fla. 1993)*; *Billingham v. Thiele, 109 So.2d 763, 764 (Fla. 1959)*.

IV. STATE CONTRACTING'S OBJECTIONS

On November 4, 2004, SCEC filed its Objections to the Magistrate's R&R [DE 552] wherein it made the following objections: (1) that the Magistrate misinterpreted *Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995)* and its progeny; and (2) that Magistrate Torres erred in determinating that the violations of the Florida Bar *Rule 4-1.5* were immaterial and unsubstantial.

A. Chandris and its Progeny

In the R&R, Magistrate Torres concluded that "to render this contract unenforceable based upon a violation of *Rule 4-1.5*, one must find that the SCEC contract is illegal,' prohibited by this rule,' or seeks a fee that is clearly excessive as defined by this rule.'" (R&R at p. 37.) In its Objections to the R&R, SCEC argues this interpretation of the law governing contingent fee agreement is incorrect. [10] According to SCEC, *Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995)*, mandates strict compliance with the rules governing contingent fees. *Chandris, 668 So.2d at 185-86*. As such, SCEC argues, that a contract that fails to fully comply with the rules must be deemed unenforceable under the Chandris standard. Here, Magistrate Torres found that the contingent fee agreement contained a number of minor violations of the rules governing such agreements.[11] Based upon

these violations SCEC argues that under the standard imposed by Chandris the Court must find the contingent fee agreement in this matter to be unenforceable. This Court disagrees.

Chandris did not involve the application of *Rule 4-1.5*. Rather than addressing *Rule 4-1.5*, Chandris involved the old Code of Professional Responsibility, DR 2-106. *Chandris, 668 So.2d at 185 n.3*. However, while Chandris decision did not address the application of *Rule 4-1.5*, the Florida Supreme Court did expressly address the application of this rule in T*Amendments to The Rules Regulating the Florida Bar, 519 So. 2d 971 (Fla. 1987)*. When addressing the "Enforceability of Fee Contracts" the Florida Supreme Court found that fee contracts would ordinarily be enforceable unless illegal, obtained through improper advertising or solicitation, prohibited by the rule, or clearly excessive as define by the rule. *Id. at 975*.

Applying this stand, many Florida courts post-Chandris have found that contingent fee agreements can be enforceable even if they have technical or immaterial violations of *Rule 4-1.5(d)*. See, e.g., *Lackey v. Bridgestone/Firestone, Inc., 855 So. 2d 1186, 1188 (Fla. 3d DCA 2003), rev. denied, 870 So. 2d 822 (Fla. 2004)* (holding that the inclusion of an unenforceable term should not void the entire contract); *Franklin & Marbin, P.A. v. Mascola, 711 So. 2d 46 (Fla 4th DCA 1998)* (holding that a lawyer is entitled to his contract fee in the absence of a determination by a court that the fee contract is illegal, prohibited or excessive); *Corvette Shop & Supplies, Inc. v. Coggins, 779 So. 2d 529, 531 (Fla. 2d DCA 2000)* (refusing to invalidate an entire contingency fee contract even though it contained violations of the rule).[12] Accordingly, Magistrate Torres

did not err in his interpretation of applicable Florida law.

B. Violations of Rule 4-1.5

SCEC further objects to the R&R on the grounds that the violations of *Rule 4-1.5* were "material and substantial." According to SCEC a rule violation cannot be technical and immaterial when the violation results in prejudice to a client. Here, SCEC argues that it has been prejudiced by Faro and Ross' failure to comply with *Rule 4-1.5* because this failure has resulted in protracted litigation over the contingent fee agreement that would not likely have occurred if the rule had been followed. Furthermore, SCEC argues that the award to Ross should be reduced by the amount of attorneys' fees and costs SCEC has expended in the adjudication of Ross' charging lien. The Court disagrees.

SCEC does not provided, and the Court does not find, legal support for the argument that a rule violation is necessarily substantial and material if it the violation causes prejudice to a client. However, even if SCEC were able to provide such legal support, the Court does not find that SCEC has suffered a degree of prejudice that would necessitate a finding that the violations in this matter are substantial and material. While it is evident from the factual findings that SCEC has suffered some prejudice in this matter as a result of its bickering lawyers, any such prejudice is easily remedied by the Court interpreting the infirm provisions in the contract against the Ross. See, e.g., *Arabia v. Siedlecki, 789 So.2d 380, 383 (Fla. 4th DCA 2001)*. Here, Magistrate Torres has interpreted these infirm provisions of the contingent fee agreement

against Ross; thus mitigating any prejudice suffered by SCEC.

Lastly, SCEC's requests that Ross' recovery be reduced by the amount of attorney's fees and costs SCEC incurred during the adjudication of Ross' charging lien. The Court notes that this is a new argument that was never presented to Magistrate Torres, and thus never addressed in the R&R. As such, this request falls beyond the scope of a proper objection to this R&R, and thus the Court will not address its merits. However, the Court notes that SCEC's request would be more suitably addressed in a Motion for Attorneys' Fees and Costs.[13]

V. MOTION TO LIMIT DISBURSEMENT OF SETTLEMENT FUNDS IN COURT REGISTRY

Ross' Motion to Limit Disbursement of Settlement Funds Deposited in the Court Registry [DE 559] requests that the Court reserve $ 4,577,700.00, plus accrued interest, in the Court registry pending the completion of an appeal of this Court's ruling on the parties objections to Magistrate Torres' R&R. In essence, Ross is making an initial motion in the district court pursuant to *Federal Rule of Appellate Procedure 8(a)(1)*, which allows a district Court to stay its judgment or order pending resolution of an appeal. The Court finds that Ross has not satisfied the stringent standards required for a stay pending appeal. *Hegna v. O'Neill, 2002 U.S. App. LEXIS 16173, No. 02-5208, 2002 WL 1827821, *1 (D.C. Cir. Aug. 9, 2002)* (citing *Washington Metropolitan Area Transit Com. v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 559 F.2d 841, 843 (D.C. Cir. 1977))*. Accordingly, Ross' Motion is hereby denied.

Accordingly it is **ORDERED AND ADJUDGED** as follows:

1. The Report and Recommendation [DE 548], and the accompanying Findings of Facts and Conclusions of Law [DE 549], of Magistrate Judge Edwin G. Torres, dated October 25, 2004, are hereby **ADOPTED**;

2. Ross' Motion to Adjudicate his Charging Lien [DE 493] is hereby **GRANTED.** Ross is entitled to a contingent fee payable from SCEC's recovery in the lawsuit in the amount of $ 1,094,483.34;

3. Ross' January 7, 2002 Charging Lien [DE 446] is hereby **DISCHARGED WITH PREJUDICE**;

4. Plaintiff's Motion for Enlargement of Time to File Amended Objections and to Respond to Ross' Notice of Filing Citations and Supplementation in Support of his Objections to the Magistrate's Report and Recommendation [DE 588] is hereby **DENIED**;

5. Ross' Motion to Limit Disbursement of Settlement Funds Deposited in the Court Registry [DE 559] is hereby **DENIED.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30 day of March, 2005.

WILLIAM P. DIMITROULEAS

United States District Judge

Footnotes

N1 In the Findings of Fact and Conclusions of Law [DE 549] that accompany the Report and Recommendation

[DE 548], Magistrate Torres provides a comprehensive review of the procedural history of this case. The Court hereby adopts and deems that review incorporated into this Order.

n2 Magistrate Torres arrived at the $ 1,094,483.34 amount by finding that the total amount of SCEC's recovery in the above-styled matter to be $ 8,000,000.00. According to Magistrate Torres the total contingent fee percentage under the contract was 33.33%. As such, the total contingent fee recovered under the contract would be $ 2,666,666.67. From the total contingent fee recovery Magistrate Torres found that Ross is entitled to 50%, or $ 1,333,333,34. Subtracting the $ 238,850.00 in hourly fees previously paid to Ross, Magistrate Torres concluded that Ross should receive $ 1,094,483.34.

n4 Ross' November 17, 2004 Objections to the R&R raises challenges to Magistrates Torres' Findings of Fact in paragraphs 20, 27-31, 36, 38-40, 46, 53, 55-57, 59, 60, 62-64, 66, 75, 81-82, 87, 89, 90, and 93. Ross' March 1, 2005 Notice attempts to supplement the challenges to each of the before mentioned paragraphs with the exception of paragraphs 38, 55-56, 62, 82, 87, and 93.

n5 On March 16, 2005, SCEC filed a Motion to Amend its Objections, but only sought such leave after Ross filed his March 1, 2005 Notice that purported to amend his original Objections. The Court notes that Ross did not request leave from the Court to amend prior to filing his March 1, 2005 Notice. Moreover, as of the date of this Order Ross has still never sought leave to amend his Objections.

n6 The Court notes that Ross' March 1, 2005 Notice, was largely an attempt to rectify the inadequacies of his

objections to Magistrate Torres' Findings of Fact. As discussed at length above, the Court will not considered Ross' March 1, 2005 Notice because of its excessive delay. This matter has been pending for well over a year, and it is far past due for a resolution. Ross fails to explain why he delayed ordering the transcripts from the March 2004 hearings before Magistrate Torres. However, no matter what caused Ross' delay, Ross' actions should not equate to further delay in the resolution of this matter.

n7 Ross' Objections to Finding of Fact PP 27-29, 46, 57, 59, 60, 63, 66, 75, 81, 89, and 90.

n8 Ross' Objections to Finding of Fact PP 31, 38, 53, 55-56, 64, and 82.

n9 Ross calculates his "value of settlement" figure as follows: "Take the fee SCEC paid Faro, $ 1,315,900.00 and divide that number by 25% (based upon the 25/75 split in the Agreement). Doing so yields a figure of $ 5,263,600.00, which is the total attorney fee due under the Agreement. Since, the total attorney fee is one-third of the value of settlement, as set fort in the Agreement, to compute the value of settlement', divide the total attorney fee $ 5,263,600.00 by one-third and you get $ 15,950,303.00." (Ross' Objection to the R&R [DE 557] at p. 18 n.76.)

The Court notes that Ross' calculation is based upon the 75/25 fee split rejected by the Court in a previous section of this Order.

n10 SCEC also asserts that *Rule 4-1.5(d)* is a general fee agreement rule, and thus not directly applicable to contingent fee contracts. The Court finds this argument unpersuasive. Contingent fee agreements are a subset

of all general fee agreements, and thus should be afforded the protections provided by *Rule 4-1.5(d)*.

n11 Magistrate Torres found that the contingent fee agreement in this matter violated the rules because: (1) Ross failed to sign the contract in violation of *Rule 4-1.5(f)(2)*; (2) the agreement did not expressly provide the method by which the fee would be determined and the percentages that would accrue to Faro and Ross in violation of *Rules 4-1.5(f)(1)* and *Rule 4-1.5(g)(2)(B)*; (3) the agreement did not provide what litigation expenses would be deducted from the recovery, or whether such expenses would be deducted before or after the contingent fee is calculated in violations of *Rules 4-1.5(f)(1)* and *Rule 4-1.5(g)(2)(B)*; and (4) the agreement did not fully detail what was intended by the term "value of settlement" as the basis for calculating the contingent fee in violation of *Rule 4-1.8*.

n12 The Court finds SCEC's attempt to distinguish the case law relied upon by Magistrate Torres to be unpersuasive. In the few cases where contingent fee contracts have been held to be unenforceable by Florida courts the violations involved have been substantially greater than in the present matter. Moreover, Magistrate Torres adequately addresses this matter in footnote fifteen on page thirty-eight of the R&R, which this Court adopts and deems incorporated here.

n13 The Court takes no position at this time as to the potential merits of such a subsequent Motion for Attorneys' Fees and Costs by SCEC.

CASE NO. 97-7014-CIV-DIMITROULEAS
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation,
Plaintiff,

vs.

CONDOTTE AMERICA, INC., a Florida corporation, f/k/a/ RECCHI AMERICA, INC, et al. Defendants.

March 30, 2005, Decided

COUNSEL: For STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation, plaintiff: Glenn Neil Smith, William Grant McCormick, Ruden McClosky Smith Schuster & Russell, Fort Lauderdale, FL; Mike Albert Piscitelli, Vezina Lawrence & Piscitelli, Fort Lauderdale, FL; Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For THE HARDAWAY COMPANY, a Georgia corporation, defendant: Charles David Harper, Foley & Lardner, Tampa, FL; John Harrison Rains, III, Tampa, FL.

For NORTHERN TRUST BANK OF FLORIDA, N.A., garnishee: Bruce Jacobs, Camner Lipsitz & Poller, Coral Gables, FL.

For THE HARDAWAY COMPANY, counter-claimant: Charles David Harper, Foley & Lardner, Tampa, FL; John Harrison Rains, III, Tampa, FL.

For STATE CONTRACTING & ENGINEERING CORPORATION, counter-defendant: Richard Stuart Ross, Donna M. Ballman, Davie, FL.

For STATE PAVING CORPORATION, a Pennsylvania corporation, plaintiff: Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For STATE CONTRACTING & ENGINEERING CORPORATION, counter-defendant: Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For STATE PAVING CORPORATION, counter-defendant: Richard Stuart Ross, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

JUDGES: WILLIAM P. DIMITROULEAS, United States District Judge.

OPINION BY: WILLIAM P. DIMITROULEAS

OPINION:

OMNIBUS ORDER APPROVING REPORT AND RECOMMENDATION AND DISCHARGING CHARGING LIEN

THIS CAUSE is before the Court upon the Report and Recommendation on Richard S. Ross' Notice of Filing Charging Lien [DE 548], signed by Magistrate

Edwin G. Torres on October 25, 2004. In reviewing the Report and Recommendation, the Court has considered the October 25, 2004 Findings of Fact and Conclusions of Law [DE 549] of Magistrate Judge Edwin G. Torres, the October 26, 2004 Supplement to the Report and Recommendation [DE 551] of Magistrate Judge Torres, Magistrate Torres' November 9, 2004 Order Denying Ross' Motion for Reconsideration [DE 556], Ross' Objections to the Report and Recommendation [DE 557], Plaintiff's Objections to the Magistrate's Report and Recommendation [DE 552], Ross' Response to the Plaintiff's Objections to the Magistrate's Report and Recommendation [DE 560], Plaintiff's Response to Ross' Objections to the Magistrate's Report and Recommendations [DE 565], and Plaintiff's Motion for Enlargement of Time to File Amended Objections and to Respond to Ross' Notice of Filing Citations and Supplementation in Support of his Objections to the Magistrate's Report and Recommendation [DE 588]. Pursuant to *28 U.S.C. § 636(b)(1)(C)*, the Court has conducted a *de novo* review of the entire court record herein, and is otherwise fully advised in the premises.

I. BACKGROUND[1]

On October 25, 2004, Magistrate Judge Edwin G. Torres issued a Report and Recommendation ("R&R') on Richard S. Ross' Motion and Memorandum of Law to Adjudicate his Charging Lien [DE 548]. In that R&R, Magistrate Torres found, when sitting in equity, (1) an express or implied contract between Richard S. Ross ("Ross") and Plaintiff State Contracting & Engineering Corporation ("SCEC"); (2) an express or implied understanding that payment to Ross was contingent upon and would be paid from the recovery obtained by SCEC in the above styled matter; (3) that SCEC has

disputed the amount of Ross' fee under the contract; and (4) that Ross had timely filed a notice of lien. Additionally, Magistrate Torres found that Ross is entitled to a contingent fee payable from SCEC's recovery in the above-styled matter in the amount of $ 1,094,483.34.[2] Accordingly, Magistrate Torres recommends that this Court grant Ross' Motion to Adjudicate his Charging Lien [DE 493], and discharge with prejudice Ross' January 7, 2003 Charging Lien [DE 446].

II. SCEC'S MOTION FOR ENLARGEMENT OF TIME TO FILE AMENDED OBJECTIONS

On October 25, 2004, Magistrate Torres entered his R&R [DE 548] on Richard S. Ross, Esq.'s Motion and Memorandum of Law to Adjudicate his Charging Lien [DE 493]. The next day, on October 26, 2004, Magistrate Torres entered a Supplement to the R&R [DE 550], which notified the parties that they had ten business days from the date of the R&R to file written objections. The October 26, 2004 Supplement further informed the parties that a failure to timely object would bar the parties from a *de novo* determination by this Court of an issue covered by the R&R and would bar the parties from attacking the factual findings accepted or adopted by this Court. Additionally, the October 26, 2004 Supplement notified the parties that no extension of time would be given unless the motion for an extension was accompanied by a motion for reconsideration or clarification of the R&R or Findings of Fact and Conclusions of Law.

SCEC filed its Objections to the Magistrate's R&R [DE 552] on November 4, 2004. On November 5, 2004, Ross filed a Motion for Reconsideration of the R&R to

Adjudicate Richard Ross' Charging Lien [DE 553]. On the same day, Ross filed a Motion for Enlargement of Time Within Which to File Objections to the R&R [DE 554] that requested a ten day extension from the date Magistrate Torres ruled on the Motion for Reconsideration in which to file objections to the R&R. On November 8, 2004, Magistrate Torres granted Ross' Motion for Extension of Time [DE 555], and on November 9, 2004 Magistrate Torres denied Ross' Motion for Reconsideration [DE 556]. In the November 9, 2004 Order Denying Ross' Motion for Reconsideration [DE 556, p. 4] Magistrate Torres informed the parties that the deadline for filing objections or amended objections to the R&R would be November 16, 2004. The November 9, 2004 Order again notified the parties that a failure to timely object would bar the parties from a *de novo* determination by this Court of an issue covered by the R&R and would bar the parties from attacking the factual findings accepted or adopted by this Court on appeal. Ross filed his Objections to the Magistrate's R&R [DE 557] on November 17, 2004.[3]

On March 1, 2005, almost four months after the November 16, 2005 deadline for objections and amended objections, Ross filed a Notice of Filing Record Citations and Supplementation in Support of His Objections to Magistrate's R&R [DE 587]. In essence, this Notice attempts to amend Ross' November 17, 2004 Objections to Magistrate Torres' R&R [DE 557] by including specific record citations as well as the specific basis for each of Ross' objections to the Magistrates' Findings of Fact [DE 549].[4] On March 16, 2005, SCEC filed its Motion for Enlargement of Time to File Amended Objections and to Respond to

Ross' March 1, 2005 Notice [DE 588]. In the Motion, SCEC requests the opportunity to file its own Amended Objections as well as to responding to Ross' amendments.

When a party files timely and specific objections to a Magistrate's finding of facts district courts have an obligation to conduct a *de novo* review of the record with respect to that factual issues. *LoConte v. Dugger, 847 F.2d 745, 749-50 (11th Cir.), cert. denied, 488 U.S. 958, 109 S. Ct. 397, 102 L. Ed. 2d 386 (1998).* Here, Magistrate Torres' November 9, 2004 Order notified the parties that the deadline for objections and amended objections to the R&R was November 16, 2004. As discussed above, both parties filed timely Objections that the Court will consider below. However, the recent, yet dilatory, attempts by both parties to amend their Objections will not be considered by the Court.

The parties' long-belated efforts to amend come four months after the November 16, 2004 deadline. During that four month period neither party requested leave of this Court to amend its original Objections, until exactly four months after the deadline.[5] The Court finds the delay inexcusable. While minor procedural violations will be tolerated, the delay in question here amounts to a causal disregard for Court imposed deadlines which will not be tolerated. See generally *Ritacca v. Abbott Labs., 203 F.R.D. 332 (N.D. Ill. 2001)*(holding that minor lapses are tolerated by courts but inexcusable and unjustified delay will not be tolerated). As such, the Court will not consider Ross' March 1, 2005 Notice of Filing Record Citations and Supplementation in Support of His Objections to

Magistrate's R&R [DE 587]; and will deny SCEC's Motion for Enlargement of Time to File Amended Objections and to Respond to Ross' March 1, 2005 Notice [DE 588].

III. ROSS' OBJECTIONS

On November 17, 2004, Ross filed his Objections to the Magistrate's R&R [DE 557] wherein he made the following objections: (1) that under the joint venture analysis employed by Magistrate Torres, the venture is entitled to receive the full contracted fee; (2) that Magistrate Torres erred in conducting an accounting of the fee split between Ross and John H. Faro, Esq. ("Faro"); (3) pursuant to *Federal Rule of Civil Procedure 59*, SCEC should not be allowed a second chance to provide evidence of litigation costs it incurred; and (4) Magistrate Torres erred in limiting the value of the settlement to only the present cash component. Additionally, Ross raises challenges to Magistrates Torres' Findings of Fact in paragraphs 20, 27-31, 36, 38-40, 46, 53, 55-57, 59, 60, 62-64, 66, 75, 81-82, 87, 89, 90, and 93.

A. Ross' Objections to Magistrate Torres' Findings of Fact

The form, timing and content of objections to a Magistrate Judge's R&R are governed by *28 U.S.C. § 636(b)* and Local Magistrate Rule 4(b). According to *28 U.S.C. § 636(b)(1)*, "within ten days after being served with a copy [of the R&R], any party may serve and file written objections to such proposed findings and recommendations as provide by rules of court." Local Magistrate Rule 4(b) demands that written objections "shall specifically identify the portions of the proposed findings, recommendations or report to which objection

is made, the specific basis for such objections, and supporting legal authority." S.D. Fla. L.R. 4(b). As such, it is incumbent upon the parties filing objections to an R&R to specifically identify those findings objected to and the specific basis for such objections. *Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir.), cert. denied, 488 U.S. 983, 109 S. Ct. 534, 102 L. Ed. 2d 566 (1988).* If an objection fails to identify the specific findings or a specific basis the district court need not consider it. Id.

Here, Ross' objections to Magistrate Torres' Findings of Fact prove to be inadequate under the standards established by *28 U.S.C. § 636(b)(1)* and Local Magistrate Rule 4(b). n6 Ross' objections are inadequate because they lack the specificity required under the law. For example, Ross objects to the Findings of Fact by generally declaring that the finding is "contrary to the record evidence, including the testimony of" certain individuals[7] or merely "contrary to record evidence."[8] Such objections fail to specifically identify the portions of the record or witness testimony that support the objection. Ross' failure to timely obtain the necessary transcripts should not burden SCEC or the Court with further delays, which would result if the Court were to consider Ross' four month-late supplement. Accordingly, the Court finds Ross' objections to Magistrate Torres' Findings of Fact to be legally insufficient.

B. Ross' Objection to the Joint Venture Not Receiving the Full Contracted Fee

In the R&R dated October 25, 2004, Magistrate Torres found that Faro and Ross were in effect joint ventures under Florida law. Employing the law of

partnerships, which applies to joint ventures, Magistrate Torres further found that Faro's discharge did not relieve SCEC from its obligations to Ross, the surviving member of the joint venture, under the fee agreement. Under this analysis Magistrate Torres held that Ross was in charge of winding up the affairs of the joint venture's purpose -- i.e., the representation of SCEC through judgment or settlement-and in doing so Ross remained accountable to Faro for any loss suffered or profit gained by their joint venture. Magistrate Torres valued the total amount of SCEC's recovery to be $ 8,000,000.00, of which the joint venture was owed one-third in a contingent fee, or $ 2,666,666.67. However, instead of awarding the entire amount of the contingency fee to Ross, Magistrate Torres reduced Ross' recovery by half based on a finding that Ross and Faro had agreed to split the fee equally. After further subtracting $ 238,850.00 in hourly fees previously paid to Ross, Magistrate Torres concluded that Ross was entitled to received $ 1,094,483.34.

In his Objection to the R&R, Ross contends that Magistrate Torres erred in reducing the continency fee award by half. According to Ross, as the surviving member of the joint venture he is entitled to the full contingency fee award of $ 2,666,666.67. The Court finds Ross' argument to be misplaced. The matter before Magistrate Torres was that of Ross' Motion and Memorandum of Law to Adjudicate his Charging Lien [DE 493], not the adjudication of a joint venture's charging lien. Magistrate Torres was charged with determining the amount, if any, Ross was entitled to from his former client. In preforming this task it was necessary to first determine how much Ross and Faro

were due under the fee agreement that existed between their "joint venture" and SCEC. However, to stop at this step in the process, as Ross desires, would have prematurely ended inquiry, since the task before Magistrate Torres was to determine the sum owed to Ross-not the sum owed to Ross and Faro. To accomplish this task, it was incumbent upon Magistrate Torres to proceed further and determine how much of that contingency fee Ross was entitled to receive. Magistrate Torres concluded, from Ross' own testimony, that there was a verbal agreement between Faro and Ross that the contingency fee would be split equally. Thus, this Court finds that Magistrate Torres did not err when finding that Ross was entitled to half of the contingency fee award, rather than the full contingency fee award.

C. Ross' Objection to Splitting the Fee Between Himself and Faro

In his Objections to the R&R, Ross also asserts that Magistrate Torres erred in conducting an accounting of the fee split between himself and Faro. According to Ross, Magistrate Torres exceeded the scope of this Court's October 31, 2003 referral by adjudicating a non-existent claim for an accounting. Additionally, Ross asserts, in the alternative, that if Magistrate Torres had the authority to account for a fee split, the Magistrate nevertheless erred in: (1) failing to include "additional profits" received by Faro in the total contingency fee award, and (2) rewriting the fee agreement to determine that the Faro and Ross had agreed to split the fee equally. The Court disagrees with Ross on each account.

First, as explained more fully in the Court's handling of the previous objection, the task asked of Magistrate Torres in this matter was to adjudicate Ross' charging lien. Nothing in the record supports a conclusion that Magistrate Torres did anything more than determine what amount of money was owed to Ross by SCEC. That was the task asked of the Magistrate, and that was the task that he preformed. As such, this Court finds that Magistrate Torres did not preform an accounting in this matter.

Second, Ross' contention that Faro's settlement should have been included in the total contingency fee award is misplaced. Ross' argument again misconstrues the task that was referred to Magistrate Torres. As explained more fully in the response to the previous objection, Magistrate Torres was referred the task of adjudicating Ross' charging lien, not the adjudication of a charging lien from the "joint venture" of Ross and Faro. As such, the resolution of Faro's charging lien through a separate settlement agreement should have no effect upon the adjudication of Ross' charging lien. Accordingly, Magistrate Torres acted properly in not considering in Faro's settlement when determining Ross' charging lien.

Third, Magistrate Torres did not rewrite the fee agreement in determining that Faro and Ross agreed to split the fee equally. There is no doubt that the Florida Bar standard contingent fee schedule was incorporated into the fee agreement in this matter. Ross contends that the inclusion of *Rule 4-1.5(f)(4)(D)* should result in awarding himself, as the lawyer assuming primary responsibility, no less than 75% of the total contingency fee. Ross' desired result, however, ignores two critical factors. First, and

foremost, Ross testified that he and Faro had a verbal agreement that the contingency fee would be split equally. Second, the inclusion of *Rule 4-1.5(f)(4)(D)* would also have incorporated *Rule 4-1.5(f)*'s language that limits the application of that rule to representation in an "action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another. . . ." *Florida Bar Rules of Professional Conduct 4-1.5(f)*. In other words, the incorporation of *Rule 4-1.5(f)* would have made it clear that *Rule 4-1.5(f)* was not applicable to commercial cases like the one in dispute in this matter. Based upon this evidence Magistrate Torres correctly concluded that the intent of Faro and Ross was to divide the fee equally. Therefore, Magistrate Torres did not "rewrite" the agreement as Ross suggests.

D. Ross' Objection to Allowing SCEC a Second Opportunity to Provide Evidence of Litigation Costs

In the R&R, Magistrate Torres found that the contingent fee should only be applied to the net recovery of SCEC. However, Magistrate Torres noted that there was no evidence establishing the amount of litigation costs incurred by SCEC, which could be used to determine the net recovery. Thus, Magistrate Torres applied the contingency fee to the gross recovery of SCEC, but invited SCEC to file a subsequent motion supplementing the record with a statement of its litigation costs prior to settlement. Ross objects to Magistrate Torres' invitation to SCEC to supplement the record on the grounds that: (1) such a motion for reconsideration is an improper vehicle to present evidence that could have been raised earlier; and (2) if SCEC supplements the record, then Ross would

improperly bear all the burden of the litigation expenses.

The Court finds Ross' arguments persuasive. First, courts have consistently held that a motion for reconsideration is not to be used as a means to present evidence that should have been raised at the time the original motion was decided. See, e.g., *Burger King Corp. v. Ashland Equities, Inc., 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002)*; *Z.K. Marine Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992)*. Here, it would appear that the pre-settlement litigation costs incurred by SCEC should have been available for submission at the time the parties submitted their evidence to Magistrate Torres for the adjudication of Ross' charging lien. Second, if SCEC is allowed to supplement the record, Ross' contention that he should only bear half the litigation costs is arguably correct. Nevertheless, SCEC has not as of the date of this Order attempted to supplement the record with evidence of its litigation costs prior to settlement. When, and if, SCEC does so, Ross' objections may have validity. However, until then, Ross' objection is premature.

F. Ross' Objection to Limiting the Value of the Settlement to Present Cash

Finally, Ross objects to Magistrate Torres' determination that the "value of settlement" should be limited to the present cash component of the settlement. In particular, Ross contends that the "value of the settlement" must include the present value of SCEC's future royalties derived on its patents, as well as the present cash component. Ross hypothesizes that the true "value of the settlement," when including

both present and future value, comes to no less than $ 15,950,303.00;[9] a number considerably larger than the $ 8,000,000.00 cash settlement received in this matter. However, in the R&R Magistrate Torres restricted the "value of the settlement" to the $ 8,000,000.00, since that amount was the only tangible evidence of what Faro and Ross procured for SCEC in this matter. The Court agrees with Magistrate Torres.

Courts have consistently held that a charging lien should only attach to "tangible fruits" of a lawyer's services. See, e.g., *Correa v. Christensen, 780 So.2d 220, 220-21 (Fla. 5th DCA 2001)* (citing *Sinclair, Louis, Siegel, Heath, Nussbaum, & Zavertnik, P.A. v. Baucom, 428 So.2d 1383 (Fla. 1983))*. Based upon this principal courts have further held that an attorney's charging lien cannot attach to property that is not before the court. *Cole v. Kehoe, 710 So.2d 705, 706.* At this time, the only tangible evidence of the property recovered by Faro and Ross for SCEC is the $ 8,000,000.00 settlement. Moreover, speculation as to what future benefit, if any, SCEC may receive cannot produce the tangible evidence required for adjudication of a charging lien. Accordingly, Magistrate Torres was correct to limit the "value of the settlement" to the $ 8,000,000.00 settlement figure.

Additionally, the evidence does not support Ross' contention that the contigent fee should include the value of future royalties. SCEC never expressly or implicitly agreed to a definition of "settlement" or "recovery" that would allow Ross to include the present value of SCEC's future royalties in the contingent fee. Rather, the evidence demonstrates that Ross did not even discuss that the contingent fee should apply to future royalties until just before the case was settled.

As such, since these future royalties were not contracted for in the agreement, Ross' charging lien may not now attach to this property. See, e.g., *Scutieri v. Estate of Revitz, 829 F. Supp. 387, 391 (S.D. Fla. 1993)*; *Billingham v. Thiele, 109 So.2d 763, 764 (Fla. 1959)*.

IV. STATE CONTRACTING'S OBJECTIONS

On November 4, 2004, SCEC filed its Objections to the Magistrate's R&R [DE 552] wherein it made the following objections: (1) that the Magistrate misinterpreted *Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995)* and its progeny; and (2) that Magistrate Torres erred in determinating that the violations of the Florida Bar *Rule 4-1.5* were immaterial and unsubstantial.

A. Chandris and its Progeny

In the R&R, Magistrate Torres concluded that "to render this contract unenforceable based upon a violation of *Rule 4-1.5*, one must find that the SCEC contract is illegal,' prohibited by this rule,' or seeks a fee that is clearly excessive as defined by this rule.'" (R&R at p. 37.) In its Objections to the R&R, SCEC argues this interpretation of the law governing contingent fee agreement is incorrect. [10] According to SCEC, *Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995)*, mandates strict compliance with the rules governing contingent fees. *Chandris, 668 So.2d at 185-86*. As such, SCEC argues, that a contract that fails to fully comply with the rules must be deemed unenforceable under the Chandris standard. Here, Magistrate Torres found that the contingent fee agreement contained a number of minor violations of the rules governing such agreements.[11] Based upon

these violations SCEC argues that under the standard imposed by Chandris the Court must find the contingent fee agreement in this matter to be unenforceable. This Court disagrees.

Chandris did not involve the application of *Rule 4-1.5*. Rather than addressing *Rule 4-1.5*, Chandris involved the old Code of Professional Responsibility, DR 2-106. *Chandris, 668 So.2d at 185 n.3*. However, while Chandris decision did not address the application of *Rule 4-1.5*, the Florida Supreme Court did expressly address the application of this rule in T*Amendments to The Rules Regulating the Florida Bar, 519 So. 2d 971 (Fla. 1987)*. When addressing the "Enforceability of Fee Contracts" the Florida Supreme Court found that fee contracts would ordinarily be enforceable unless illegal, obtained through improper advertising or solicitation, prohibited by the rule, or clearly excessive as define by the rule. *Id. at 975*.

Applying this stand, many Florida courts post-Chandris have found that contingent fee agreements can be enforceable even if they have technical or immaterial violations of *Rule 4-1.5(d)*. See, e.g., *Lackey v. Bridgestone/Firestone, Inc., 855 So. 2d 1186, 1188 (Fla. 3d DCA 2003), rev. denied, 870 So. 2d 822 (Fla. 2004)* (holding that the inclusion of an unenforceable term should not void the entire contract); *Franklin & Marbin, P.A. v. Mascola, 711 So. 2d 46 (Fla 4th DCA 1998)* (holding that a lawyer is entitled to his contract fee in the absence of a determination by a court that the fee contract is illegal, prohibited or excessive); *Corvette Shop & Supplies, Inc. v. Coggins, 779 So. 2d 529, 531 (Fla. 2d DCA 2000)* (refusing to invalidate an entire contingency fee contract even though it contained violations of the rule).[12] Accordingly, Magistrate Torres

did not err in his interpretation of applicable Florida law.

B. Violations of Rule 4-1.5

SCEC further objects to the R&R on the grounds that the violations of *Rule 4-1.5* were "material and substantial." According to SCEC a rule violation cannot be technical and immaterial when the violation results in prejudice to a client. Here, SCEC argues that it has been prejudiced by Faro and Ross' failure to comply with *Rule 4-1.5* because this failure has resulted in protracted litigation over the contingent fee agreement that would not likely have occurred if the rule had been followed. Furthermore, SCEC argues that the award to Ross should be reduced by the amount of attorneys' fees and costs SCEC has expended in the adjudication of Ross' charging lien. The Court disagrees.

SCEC does not provided, and the Court does not find, legal support for the argument that a rule violation is necessarily substantial and material if it the violation causes prejudice to a client. However, even if SCEC were able to provide such legal support, the Court does not find that SCEC has suffered a degree of prejudice that would necessitate a finding that the violations in this matter are substantial and material. While it is evident from the factual findings that SCEC has suffered some prejudice in this matter as a result of its bickering lawyers, any such prejudice is easily remedied by the Court interpreting the infirm provisions in the contract against the Ross. See, e.g., *Arabia v. Siedlecki, 789 So.2d 380, 383 (Fla. 4th DCA 2001)*. Here, Magistrate Torres has interpreted these infirm provisions of the contingent fee agreement

against Ross; thus mitigating any prejudice suffered by SCEC.

Lastly, SCEC's requests that Ross' recovery be reduced by the amount of attorney's fees and costs SCEC incurred during the adjudication of Ross' charging lien. The Court notes that this is a new argument that was never presented to Magistrate Torres, and thus never addressed in the R&R. As such, this request falls beyond the scope of a proper objection to this R&R, and thus the Court will not address its merits. However, the Court notes that SCEC's request would be more suitably addressed in a Motion for Attorneys' Fees and Costs.[13]

V. MOTION TO LIMIT DISBURSEMENT OF SETTLEMENT FUNDS IN COURT REGISTRY

Ross' Motion to Limit Disbursement of Settlement Funds Deposited in the Court Registry [DE 559] requests that the Court reserve $ 4,577,700.00, plus accrued interest, in the Court registry pending the completion of an appeal of this Court's ruling on the parties objections to Magistrate Torres' R&R. In essence, Ross is making an initial motion in the district court pursuant to *Federal Rule of Appellate Procedure 8(a)(1)*, which allows a district Court to stay its judgment or order pending resolution of an appeal. The Court finds that Ross has not satisfied the stringent standards required for a stay pending appeal. *Hegna v. O'Neill, 2002 U.S. App. LEXIS 16173, No. 02-5208, 2002 WL 1827821, *1 (D.C. Cir. Aug. 9, 2002)* (citing *Washington Metropolitan Area Transit Com. v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 559 F.2d 841, 843 (D.C. Cir. 1977))*. Accordingly, Ross' Motion is hereby denied.

Accordingly it is **ORDERED AND ADJUDGED** as follows:

1. The Report and Recommendation [DE 548], and the accompanying Findings of Facts and Conclusions of Law [DE 549], of Magistrate Judge Edwin G. Torres, dated October 25, 2004, are hereby **ADOPTED;**

2. Ross' Motion to Adjudicate his Charging Lien [DE 493] is hereby **GRANTED.** Ross is entitled to a contingent fee payable from SCEC's recovery in the lawsuit in the amount of $ 1,094,483.34;

3. Ross' January 7, 2002 Charging Lien [DE 446] is hereby **DISCHARGED WITH PREJUDICE;**

4. Plaintiff's Motion for Enlargement of Time to File Amended Objections and to Respond to Ross' Notice of Filing Citations and Supplementation in Support of his Objections to the Magistrate's Report and Recommendation [DE 588] is hereby **DENIED;**

5. Ross' Motion to Limit Disbursement of Settlement Funds Deposited in the Court Registry [DE 559] is hereby **DENIED.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30 day of March, 2005.

WILLIAM P. DIMITROULEAS

United States District Judge

Footnotes

N1 In the Findings of Fact and Conclusions of Law [DE 549] that accompany the Report and Recommendation

[DE 548], Magistrate Torres provides a comprehensive review of the procedural history of this case. The Court hereby adopts and deems that review incorporated into this Order.

n2 Magistrate Torres arrived at the $ 1,094,483.34 amount by finding that the total amount of SCEC's recovery in the above-styled matter to be $ 8,000,000.00. According to Magistrate Torres the total contingent fee percentage under the contract was 33.33%. As such, the total contingent fee recovered under the contract would be $ 2,666,666.67. From the total contingent fee recovery Magistrate Torres found that Ross is entitled to 50%, or $ 1,333,333,34. Subtracting the $ 238,850.00 in hourly fees previously paid to Ross, Magistrate Torres concluded that Ross should receive $ 1,094,483.34.

n4 Ross' November 17, 2004 Objections to the R&R raises challenges to Magistrates Torres' Findings of Fact in paragraphs 20, 27-31, 36, 38-40, 46, 53, 55-57, 59, 60, 62-64, 66, 75, 81-82, 87, 89, 90, and 93. Ross' March 1, 2005 Notice attempts to supplement the challenges to each of the before mentioned paragraphs with the exception of paragraphs 38, 55-56, 62, 82, 87, and 93.

n5 On March 16, 2005, SCEC filed a Motion to Amend its Objections, but only sought such leave after Ross filed his March 1, 2005 Notice that purported to amend his original Objections. The Court notes that Ross did not request leave from the Court to amend prior to filing his March 1, 2005 Notice. Moreover, as of the date of this Order Ross has still never sought leave to amend his Objections.

n6 The Court notes that Ross' March 1, 2005 Notice, was largely an attempt to rectify the inadequacies of his

objections to Magistrate Torres' Findings of Fact. As discussed at length above, the Court will not considered Ross' March 1, 2005 Notice because of its excessive delay. This matter has been pending for well over a year, and it is far past due for a resolution. Ross fails to explain why he delayed ordering the transcripts from the March 2004 hearings before Magistrate Torres. However, no matter what caused Ross' delay, Ross' actions should not equate to further delay in the resolution of this matter.

n7 Ross' Objections to Finding of Fact PP 27-29, 46, 57, 59, 60, 63, 66, 75, 81, 89, and 90.

n8 Ross' Objections to Finding of Fact PP 31, 38, 53, 55-56, 64, and 82.

n9 Ross calculates his "value of settlement" figure as follows: "Take the fee SCEC paid Faro, $ 1,315,900.00 and divide that number by 25% (based upon the 25/75 split in the Agreement). Doing so yields a figure of $ 5,263,600.00, which is the total attorney fee due under the Agreement. Since, the total attorney fee is one-third of the value of settlement, as set fort in the Agreement, to compute the value of settlement', divide the total attorney fee $ 5,263,600.00 by one-third and you get $ 15,950,303.00." (Ross' Objection to the R&R [DE 557] at p. 18 n.76.)

The Court notes that Ross' calculation is based upon the 75/25 fee split rejected by the Court in a previous section of this Order.

n10 SCEC also asserts that *Rule 4-1.5(d)* is a general fee agreement rule, and thus not directly applicable to contingent fee contracts. The Court finds this argument unpersuasive. Contingent fee agreements are a subset

of all general fee agreements, and thus should be afforded the protections provided by *Rule 4-1.5(d)*.

n11 Magistrate Torres found that the contingent fee agreement in this matter violated the rules because: (1) Ross failed to sign the contract in violation of *Rule 4-1.5(f)(2)*; (2) the agreement did not expressly provide the method by which the fee would be determined and the percentages that would accrue to Faro and Ross in violation of *Rules 4-1.5(f)(1)* and *Rule 4-1.5(g)(2)(B)*; (3) the agreement did not provide what litigation expenses would be deducted from the recovery, or whether such expenses would be deducted before or after the contingent fee is calculated in violations of *Rules 4-1.5(f)(1)* and *Rule 4-1.5(g)(2)(B)*; and (4) the agreement did not fully detail what was intended by the term "value of settlement" as the basis for calculating the contingent fee in violation of *Rule 4-1.8*.

n12 The Court finds SCEC's attempt to distinguish the case law relied upon by Magistrate Torres to be unpersuasive. In the few cases where contingent fee contracts have been held to be unenforceable by Florida courts the violations involved have been substantially greater than in the present matter. Moreover, Magistrate Torres adequately addresses this matter in footnote fifteen on page thirty-eight of the R&R, which this Court adopts and deems incorporated here.

n13 The Court takes no position at this time as to the potential merits of such a subsequent Motion for Attorneys' Fees and Costs by SCEC.

Case No. 97-7014-CV-Dimitrouleas/Torres

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation,
Plaintiff,

v.

CONDOTTE AMERICA, INC., a Florida corporation, f/k/a, RECCHI AMERICA, INC., et al.,
Defendants.

October 25, 2004, Decided

REPORT AND RECOMMENDATION ON MOTION TO ADJUDICATE RICHARD S. ROSS'S CHARGING LIEN

This matter is before this Court on Richard S. Ross, Esq.'s Motion and Memorandum of Law to Adjudicate his Charging Lien (D.E. 493) pursuant to an Order of Reference entered by the Honorable William P. Dimitrouleas, United States District Judge (D.E. 425). The Court has carefully considered the Motion to Adjudicate, Plaintiffs Response, the supplemental memoranda, arguments of counsel, record evidence presented at an evidentiary hearing, and the Court file. In accordance with the Findings of Fact and Conclusions of Law that have been issued on this date, the undersigned Magistrate Judge RECOMMENDS that the District Court order as follows:

1. The Court has jurisdiction to adjudicate the charging lien filed by Richard S. Ross ("Ross") to enforce his right to obtain payment for legal services rendered from the monetary recovery obtained in this lawsuit by Plaintiff State Contracting & Engineering Corp. ("SCEC").

2. The Court, sitting in equity, finds (1) an express or implied contract between the Ross and SCEC; (2) an express or implied understanding that payment to Ross was contingent upon and would be paid from the recovery obtained by SCEC in this case; (3) SCEC has disputed the amount of Ross's fee; and (4) Ross filed a timely notice of lien.

3. The Court finds that Ross is entitled to a contingent fee payable from SCEC's recovery in the lawsuit to be calculated as follows:

Total Amount of SCEC's Recovery:	$8,000,000.00
Total Contingent Fee Percentage:	33.33%
Total Contingent Fee Under Contract:	$2,666,666.67
Ross's Share of the Contingent Fee:	50.00%
Total Contingent Fee to Ross:	$1;333,333.34
Less Hourly Fees Already Paid to Ross:	(238,850.00)

Total Fee Owed to Ross on Charging Lien: $1,094,483.34

4. Ross's Motion to Adjudicate his Charging Lien [D. E. 493] is GRANTED. Ross's Charging Lien, filed on January 7, 2002 [D.E. 446], is hereby DISCHARGED WITH PREJUDICE.

5. The Clerk of the Court will be DIRECTED to release funds held in this action from the Court Registry as follows:

a. Payment in the amount of One Million Ninety Four Thousand Four Hundred Eighty Three and 34/100 Dollars ($1,094,034.34), plus a pro rata share of the accumulated interest, shall be made payable to Richard S. Ross, P.A., taxpayer identification number 262-45-2649. Richard S. Ross, Esq. shall be permitted to retrieve said payment, in person, upon the presentation of proper identification.

b. Payment in the amount of Five Million Eight Hundred Five Thousand Nine Hundred Sixty Five and 661100 Dollars ($5,805,965.66), plus the remaining accumulated interest, shall be made payable to State Contracting & Engineering Corporation, taxpayer identification number 65-0405645. Glenn Smith, Esq., on behalf of State Contracting & Engineering Corporation, shall be permitted to retrieve said payment, in person, upon the presentation of proper identification.

DONE and ORDERED at Fort Lauderdale, Florida this 25th day of October, 2004.

Case No. 97-7014-CV-Dimitrouleas/Torres

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation,
Plaintiff,

v.

CONDOTTE AMERICA, INC., a Florida corporation, f/k/a, RECCHI AMERICA, INC., et al.,
Defendants.

October 25, 2004, Decided

COUNSEL: For STATE CONTRACTING & ENGINEERING CORPORATION, a Florida corporation, plaintiff: Glenn Neil Smith, William Grant McCormick, Ruden McClosky Smith Schuster & Russell, Fort Lauderdale, FL; Mike Albert Piscitelli, Vezina Lawrence & Piscitelli, Fort Lauderdale, FL; Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For THE HARDAWAY COMPANY, a Georgia corporation, defendant: Charles David Harper, Foley & Lardner Tampa, FL; John Harrison Rains, III, Tampa, FL.

For SOUTHTRUST BANK, garnishee, NORTHERN TRUST BANK OF FLORIDA, N.A., garnishee: Bruce Jacobs, Camner Lipsitz & Poller, Coral Gables, FL.

For THE HARDAWAY COMPANY, counter-claimant: Charles David Harper, Foley & Lardner, Tampa, FL; John Harrison Rains, III, Tampa, FL.

For STATE CONTRACTING & ENGINEERING CORPORATION, counter-defendant: Richard Stuart Ross, Donna M. Ballman, Davie, FL.

For STATE PAVING CORPORATION, a Pennsylvania corporation, plaintiff: Richard Stuart Ross, Donna M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

For STATE CONTRACTING & ENGINEERING CORPORATION, STATE PAVING CORPORATION, counter-defendants: Richard Stuart Ross, Donna [*2] M. Ballman, Davie, FL; John H. Faro, Faro & Associates, Miami, FL.

JUDGES: EDWIN G. TORRES, United States Magistrate Judge.

OPINION BY: EDWIN G. TORRES

OPINION:

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION TO ADJUDICATE RICHARD S. ROSS'S CHARGING LIEN

This matter is before the Court on Richard S. Ross, Esq.'s Motion and Memorandum of Law to Adjudicate his Charging Lien (D.E. 493) pursuant to an Order of Reference entered by the Honorable William P. Dimitrouleas, United States District Judge (D.E. 425). A plenary five-day evidentiary hearing was held on the

above motion and the parties were given the opportunity to file supplemental memoranda thereafter in support of their respective positions. The Court has carefully considered the Motion to Adjudicate, Plaintiff's Response (D.E. 517), the supplemental memoranda, arguments of counsel, evidence presented, as well as the Court file, and is otherwise advised in the premises.

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I. FINDINGS OF FACT

At the evidentiary hearing, the Court received documentary and testimonial evidence. The testimonial evidence by the opposing parties was at times highly contradictory, requiring the Court to make credibility determinations. Based on the testimonial and documentary evidence presented, and under a preponderance of the evidence standard, the Court makes the following findings of fact. To the extent that any findings of fact constitute conclusions of law, they are hereby adopted as such; to the extent that any conclusions of law constitute findings of fact, they are also so adopted.

A. The Engagement

1. State Paving Corporation ("State Paving") is a Pennsylvania corporation, based in Broward County, Florida, that in the 1980's and 1990's was engaged in the business of providing both public and private construction services, including work on road projects for the Florida Department of Transportation (the "FDOT").

2. In 1989 State Paving bid on and was awarded a FDOT road project (the "1989 Project"). State Paving

was required, as a part of the 1989 Project, to erect sound barrier walls ("sound walls") along the highway.

3. Sound walls range in height from 15 to 30 feet, and are erected between roadways and residential areas to reduce traffic noise. Sound walls are only erected in locations in which residences are within a certain specified distance of a roadway.

4. The specifications for the 1989 Project provided for the construction of a certain type of sound wall. However, Mike Bone ("Bone"), an employee of State Paving, invented a new and more cost-effective sound wall system, which was named the integrated pile and post system (the "Integrated Post System").

5. State Paving submitted a value engineering change proposal ("VECP") to the FDOT in connection with the 1989 Project, suggesting the use of its Integrated Post System in place of the specified system. The FDOT preferred the Integrated Post System, and approved it for use on the 1989 Project. The FDOT subsequently adopted the Integrated Post System as the exclusive system for use on all FDOT sound wall projects. (Ex. B)[1]

6. In the early 1990's, State Paving applied for and received two patents for its Integrated Post System. One of the patents, referred to in these proceedings as the "288 patent," claims a novel method for constructing an integrated column and pile. The other patent, referred to in these proceedings as the "455 patent," is directed to a new apparatus comprising an integrated column and pile. (Ex. C & D)

7 The 288 patent and the 455 patent (collectively, the "Patents"), will expire on August 10, 2010.

8. After the Patents issued, State Paving made demand upon the FDOT and its contractors for payment of royalties for use of the Integrated Post System on FDOT projects. The FDOT rejected State Paving's demand for payment of royalties claiming, among other things, that the FDOT's approval of State Paving's VECP vested it with a license to use the Integrated Post System on FDOT projects, without payment of royalties.

9. The FDOT further instructed contractors installing the Integrated Post System on FDOT projects not to pay royalties to State Paving. Rather, the FDOT instructed its contractors that if any royalties were found to be due the FDOT would pay them. (Ex. B)[2]

10. State Contracting & Engineering Corporation ("SCEC") was incorporated in Florida on January 1, 1994 and took over the business and operations of State Paving. Like State Paving, SCEC is engaged in the business of providing both public and private construction services, including work on FDOT projects.

11. State Paving assigned all right, title and interest in the Patents to SCEC on May 9, 1997. (Ex. TTT)

12. After SCEC acquired the Patents, it likewise asserted the right to receive royalties for the use of the Integrated Post System on FDOT projects. When State Paving, and later SCEC. learned that the FDOT and competing contractors were using the patented designs, State Paving and SCEC began to issue notices to these entities asserting patent infringement. SCEC's efforts to resolve this issue informally with the FDOT proved unsuccessful. Thereafter, SCEC sought to retain

qualified patent infringement litigation counsel to bring suit against the FDOT and the infringing competing contractors.

13. In July 1996, SCEC hired John H. Faro, Esq. of Faro & Associates ("Faro"), an experienced intellectual property attorney, to provide litigation support services for the anticipated lawsuit against the FDOT and the infringing contractors, to enforce its rights under the Patents. Initially, Faro was to research and analyze certain issues pertaining to the Patents and THE suit against the FDOT. (Ex. E)

14. On August 27, 1996, Faro issued a letter to SCEC, analyzing the claims available to SCEC under the Patents against those who had utilized the Integrated Post System in violation of the patents. Faro recommended that a patent infringement action be filed in federal court against the FDOT and its contractors, as well as an action in state court against the FDOT based on a takings theory. (Ex. G)

15. SCEC, through its President, Tim Smith ("Smith"), then entered into discussions with Faro to represent SCEC in the anticipated patent infringement litigation.

16. At the time SCEC retained Faro, Faro advised SCEC that Faro was unable to act as patent infringement litigation counsel and that he had a disability preventing him from providing litigation services. Faro did represent, however, he could provide litigation support services to litigation counsel.

17. On or about the end of April to early May 1997, Faro contacted Richard S. Ross, Esq. ("Ross") whom Faro knew was a qualified patent litigation attorney. Faro asked Ross if he would be interested in

representing SCEC as lead counsel in connection with the anticipated patent infringement litigation against the FDOT and the construction contractors. Ross agreed to meet with the client, SCEC, regarding the anticipated litigation. Faro and Ross did not work in the same law firm.

18. Faro introduced Ross to SCEC, and proposed that Ross act as co-counsel. This introduction took place during a meeting at SCEC's office. Present at the meeting were Faro, Ross, Smith, Barry Transleau ("Transleau") and other employees of SCEC. Ross advised Smith that he was prepared to act as lead litigation counsel.

19. After the meeting, SCEC advised Faro that Ross was an acceptable choice for co-counsel.

20. On May 1, 1997, Faro drafted and circulated a partial periodic, partial contingency fee agreement in the form of a two-page letter ("the Engagement Letter") with a four-page attachment consisting of *Rule 4-1.5* of the Rules Regulating the Florida Bar.

21. While SCEC initially sought an agreement that provided for a contingent fee recovery only, Faro insisted on a partial periodic, partial contingency fee. Faro's terms were accepted by SCEC.

22. Ross was not involved in the drafting of the Engagement Letter, or in any discussion about any of its terms. Ross did agree to its terms, as drafted and expressed to the client by Faro.

23. The Engagement Letter was signed by Smith on behalf of SCEC and returned to Faro, who likewise signed the Engagement Letter. (Ex. J) Smith initialed each page of the four-page attachment to the

Engagement Letter that consisted of *Rule 4-1.5* of the Rules Regulating the Florida Bar. Smith conceded at the hearing that he believed the attachment to be part of the terms of the overall Agreement.

24. The Engagement Letter showed a "cc" to Ross, but provided no signature line for Ross.

25. The Engagement Letter contemplated that a patent infringement action would be instituted against the FDOT and various contractors and suppliers to obtain damages for past infringement of the Patents, and to secure an injunction against future infringement.

26. The Engagement Letter specifically provided:

> Both myself [Faro] and my co-counsel, Mr. Ross, propose and are agreeable to the following arrangement:
>
> Reduced hourly billing fee of $ 100 per hour, plus expenses, ***plus***
>
> > A Contingent Fee, as set forth in the current Standard Florida Bar Contingent Fee Schedule, copy of Schedule and & [sic] Statement of Clients Rights attached; ***less***
> >
> > A credit of all attorney fees billed and ***collected against recovery at the time of settlement,*** however, ***in no event would the amount of the net fee for representation be***

> ***less than one third of the value of the settlement to your Company.***
>
> In the unlikely event that your Company defaults in its obligation under this Agreement, both myself and Mr. Ross reserve the right to turn your account over for collection, in which event your Company would also be potentially responsible for the costs of collection, including attorney fees.
>
> If this arrangement is acceptable to your Company, please countersign the proposal on behalf of your Company in the space provided for your signature. A retainer of $ 7,500 is required, with $ 5000 being made payable to Richard Ross, P.A. Trust Account and $ 2,500 being made payable to Faro & Associates, P.A. Trust Account.

(Emphasis added).

27. SCEC understood that the "value of the settlement" referred only to any cash recovery as a result of the anticipated litigation. Ross was not involved in drafting the Engagement Letter, and had no discussions with SCEC regarding the "value of the settlement" language prior to, or contemporaneously with, the execution of the Engagement Letter by SCEC. Ross relied on Faro to negotiate and memorialize the agreement with SCEC.

28. There is no evidence in the record that Faro ever discussed or explained that the "value of the settlement" language was intended by Faro to include

future royalty revenues or licensing fees collected by SCEC from licensing the use of the Integrated Post System. Smith would never have agreed to such an arrangement, and neither Faro nor Ross ever suggested such an interpretation until September 2003, more than six (6) years after SCEC signed the Engagement Letter.

29. The Engagement Letter made no mention of how the contingency fee would be divided between Faro and Ross. Ross testified that it he had a verbal agreement with Faro that the contingency fee would be split equally (*i.e.* 50/50). Faro and Ross agreed to work on the case equally and share in the contingency equally, thus the reason why they never initially agreed to a proportionate split of the fee.

30. This verbal agreement between Faro and Ross regarding division of the contingent fee was never reduced to writing.

31. At the time Ross agreed to divide the contingency fee equally with Faro, Ross knew and understood that he would be lead trial counsel, and that Faro would serve in a litigation support role. In fact, Ross knew and understood that Faro was unable to perform any of the functions of lead trial counsel due to a pending disability claim. Ross would have primary litigation responsibility for SCEC.

32. Pursuant to the Engagement Letter, on or about May 16, 1997, SCEC requisitioned a retainer check for Ross in the amount of $ 5,000.00. (Ex. K) On or about June 1997, Ross received a copy of the Engagement Letter that SCEC signed (Ex. H) together with his retainer check in the amount of $ 5,000.00.

B. The Engagement Letter is Amended in 1998

33. Ross filed the instant action ("Fed I"), the first of two federal court patent infringement actions, on August 25, 1997, against the FDOT and several allegedly infringing contractors. (Ex. L) Five months later, on January 22, 1998, Faro filed his appearance in Fed I. (Ex. M)

34. That same year Ross and Faro filed an action in state court on behalf of SCEC against the FDOT based on a takings theory (the "State Court Action").[3]

35. During this time period, Faro and Ross advised SCEC that it would be necessary to include State Paving as a party-plaintiff in the Fed I action, due to assertions made by the defendants in that case of defects in State Paving's assignment of the Patents to SCEC.

36. Thereafter, Faro drafted an amendment to the Engagement Letter, dated March 17, 1998 (the "Amendment Letter"). The Amendment Letter authorized the representation of State Paving and SCEC by Faro and his co-counsel Ross, on the same terms set forth in the Engagement Letter. (Ex. N) The Amendment Letter specifically provided in part:

> This letter is intended to amend the terms of engagement of the undersigned, and Mr. Richard Ross, as set forth in the Engagement Letter of May 1, 1997 between the undersigned. Mr. Richard Ross and State Contracting & Engineering Corp., annexed hereto as an Exhibit, by the addition of State Paving as a client. . . .

> Under the terms of the May 1, 1997, Engagement Letter, (above referenced) the undersigned and Mr. Richard Ross have undertaken the representation of State Contracting & Engineering Corp. (SCEC) with respect to its filing and prosecution of certain claims against the State of Florida (and others) for the unauthorized use, infringement, taking and/or encroachment upon SCEC's exclusive property rights in certain inventions, and patents directed to such inventions. . . .
>
> The fee schedule set forth in the Engagement Letter of May 1, 1997, between the undersigned, Mr. Richard Ross and SCEC, shall remain in effect and the parties herein reaffirm the acceptance thereof. . . .
>
> Read, Understood & Accepted.

(Emphasis added).

37. Smith for SCEC, Herbert Elkins for State Paving, and Faro signed the Amendment Letter. As was the case with the Engagement Letter, Ross is identified in the Amendment Letter as a copy recipient. Ross never signed the Amendment Letter.[4]

38. Ross nevertheless contends that the first full paragraph on page two of the Amendment Letter confirms that the contingency fee set forth in the Engagement Letter was to be calculated on the future royalties and licensing fees received by SCEC from the use of the Patents. That paragraph reads as follows:

> It is further understood that the parties have previously agreed to a formula for the division of net royalties, and other net revenues realized by SCEC from its exploitation and/or enforcement of such rights (e.g. licensing); and, nothing herein is intended to alter that arrangement.

39. The only record evidence from a signatory to the Amendment Letter is that the subject language referred to an agreement between SCEC and State Paving, reflecting State Paving's insistence that, in exchange for agreeing to become a party-plaintiff in FED I, it receive ten percent (10%) of any recovery. This agreement between SCEC and State Paving was later reduced to writing on May 21, 1999. (Ex. WWW-1) That corresponds with the earlier paragraph that specifically refers to the assignment agreement between SCEC and State Paving.

40. There was no discussion with Faro or Ross and SCEC, prior to or contemporaneously with the execution of the Amendment Letter, that the "value of the settlement" language in the Engagement Letter referred to income for the future use or licensing of the Integrated Post System. There is no record evidence that the client was ever presented in writing with any notice of a claim that the value of a settlement would include an interest on royalties for future use or licensing of SCEC's patents, at least not until after SCEC settled the litigation.

C. Fed I Litigation

41. Pursuant to the Engagement Letter, Ross billed SCEC in writing on a monthly basis from June 1997 through November 2003, at an hourly rate of $ 100.00

for time expended in connection with the legal services performed in the patent infringement litigation. (Ex. GGG)

42. The rate billed by Ross to SCEC of $ 100.00 per hour represented a reduced hourly billing rate.

43. From June, 1997 through November, 2003, Ross billed SCEC for 2,388.50 hours in connection with the patent infringement litigation. (Composite Ex. MM, Attachment "E"; Ex UU: Ex. GGG)

44. SCEC never contested any of Ross's bills and SCEC paid all of Ross's bills, including costs advanced, totaling [*17] $ 238,850.00 (computed: 2,388.50 hrs x $ 100.00/hr).

45. The trial court entered summary judgment against SCEC in March 2000. Ross filed an appeal, solely prepared the appellate briefs, and presented oral argument before the Court of Appeal for the Federal Circuit. In July 2001, the Federal Circuit reversed the summary judgment, in part, and permitted SCEC to proceed to trial against the private party contractor defendants for patent infringement.[5]

46. Throughout this pretrial period, composed largely of discovery, motion practice, and the appeal of the summary judgment, Ross conducted the majority of the day-to-day litigation with Faro's assistance and counsel.

D. Fed I Goes to Trial in February 2002

47. After remand from the Federal Circuit, the case was set for trial before District Judge William P. Dimitrouleas. During the trial, held between January 2002 and February 2002, Ross presented SCEC's opening statement, evidence, and trial witnesses. Ross

cross-examined the defendants' witnesses and presented rebuttal testimony and closing argument to the jury. In other words, he performed his role as lead counsel per the Engagement and Amendment Letters.

48. Faro played a support role in the presentation of the trial; he was in attendance and acted as "second chair." Ross as lead trial counsel billed about 1391.30 hours and Faro as second chair billed 1082.5 hours for the same period. There is no dispute that during this phase of the case, Faro and Ross were working well together as co-counsel on the case.

49. On February 6, 2002, the jury rendered a verdict in SCEC's favor, finding the defendants liable for patent infringement. The jury awarded SCEC royalties in an amount of approximately $ 5.2 million. (Ex. P) Also on February 6. 2002, and in accordance with the jury's decision, the Court entered a permanent injunction in SCEC's favor. (D.E. 325) This injunction enjoined the defendants from further infringements of SCEC's patents. An amended Final Judgment and Permanent Injunction was entered by the Court in August 2002 that increased the judgment to $ 9.3 million to include pre-judgment interest. (D.E. 375) Defendants appealed that Amended Final Judgment after $ 10,230,000.00 in cash was posted in the Court Registry. (D.E. 364, 380)

E. Fed II is Filed in March 2002 as The Pending Dispute Begins

50. On March 1, 2002, one month after the jury reached its verdict in favor of SCEC, Ross prepared and filed a second patent infringement lawsuit on behalf of SCEC naming a new set of competing FDOT construction contractors in Case No. 02-60308 ("Fed

II"). (Ex. 10) Ross signed the complaint as counsel for SCEC, and Faro was identified as co-counsel.

51. At the same time, Ross wrote to SCEC asking SCEC to enter into a written contingency fee agreement, pursuant to the "same terms" as the parties' earlier Engagement Letter, in order to include the Fed II litigation in the contingency agreement. (Ex. 1) The "hybrid hourly/contingent fee contract" that Ross submitted, however, was not exactly the same as it specified an additional percentage amount -- 40% -- for any recovery up to $ 1,000,000 and 33 1/3% for any recovery more than $ 1,000,000, *plus* an additional 5% of the total recovery if an appeal was filed or post-judgment relief was required. That language had never been expressly included in the original Engagement Letter or the Amendment Letter that both referred only to a minimum percentage of "one third of the value of the settlement." (Ex. 2) Ross's proposed contract replaced that language in favor of the general term "recovery." The proposed contract did not define what "recovery" meant and did not specify what percentage of the fee Faro and Ross would each receive.

52. On March 4, 2002, Transleau hand-wrote a memo back to Ross, stating that the terms proposed by Ross in "your new contract were slightly different than the original contract," referring to the percentages of recovery proposed by Ross. (Ex. R) The "original contract" that Transleau referred to was attached to the memo, which was a copy of the Engagement Letter (not the Amendment Letter) that had been signed by SCEC but not by either Faro *or* Ross.

53. In relation to this proposed new contract, a dispute arose between Faro and Ross. In a letter dated

June 18, 2003, from Faro to SCEC's corporate counsel, John Beck ("Beck"), Faro claimed that the dispute related to his disagreement with Ross as to an additional 5% contingency fee on the recovery for Ross's work on the appeal. (Ex. 9) Additionally, Faro and Ross disagreed on the proportional amounts that each would receive under the engagement for the overall contingency fee. This disagreement over the scope of the contingent fee is what led Ross, according to Faro, to draft new proposed engagement contracts that would supercede the original Engagement Letter.

54. Ross then revised his proposal for the amended engagement contract. (Ex. 9) Ross now contemplated different contingency fees for the new Fed II case, the litigation in state court, as well as the existing Fed I case before this Court. Additionally, Ross proposed that the parties now agree to specific language that would delineate what amounts Faro and Ross would receive on the recovery in these cases. Generally, Ross proposed that he receive approximately 65% of the overall fee. Ross was not as clear, however, as to what he meant by a recovery, and instead proposed only the additional language that "the contingent fee percentages shall be based upon the value to THE CLIENT of the full recovery, whether by judgment, settlement, or otherwise." Ross did not refer to any entitlement to royalties or licensing fees that SCEC might ultimately obtain following the litigation as being part of the recovery in the contract.

55. Faro never agreed to the language in any of Ross's proposed versions of a new agreement. Faro apparently insisted that a proportional fee was all that was required under the client's Engagement Letter, based upon the proportionate attorney activity on the

case. Faro believed that ratio to be approximately 55% to 45%, with Ross receiving the greater percentage based upon what work had been done through that date (June 2003). (Ex. 9 at 2)

56. Faro did not agree to any new engagement contract, and neither did SCEC. After receiving Ross's proposed March 2003 contract, SCEC never signed that contract, nor any other revised engagement contract throughout the Fed II litigation and up to the time all the litigation had ended. SCEC continued to perform under what it believed to be the operating agreement with Faro and Ross -- the original May 1997 Engagement Letter.

57. During this same period of time, the relationship between Faro and Ross continued to deteriorate over their dispute over the fee percentages. Faro informed Smith that Faro was having trouble working out his issues with Ross, and requested that Smith meet with Robert Cooper, an attorney with patent litigation experience, suggesting to Smith that Mr. Cooper replace Ross for the remainder of the litigation. Ross was apparently never told about this meeting. Smith, however, was pleased with the efforts and working relationship of the Faro/Ross litigation team throughout Fed I, and wanted the team to continue in the same manner as originally contemplated. Even though he met with Mr. Cooper, Smith did not agree to replace Ross as lead counsel.

58. Faro and Ross later agreed that Faro would become more directly involved in the prosecution of Fed II. Faro and Ross informed Smith of their discussions, and Smith did not object to the new arrangement. However, Smith believed, and Ross

agreed, that Ross would still be lead counsel in the overall litigation. Faro filed a notice of appearance in Fed II on August 6, 2002, referring to himself as "additional counsel." (D.E. 29)

59. The dispute between Faro and Ross over division of the contingency fee continued throughout 2002 and into 2003, and the attorneys involved Smith and others at SCEC to attempt to reach a settlement. Early in 2003, Transleau and Bone unsuccessfully attempted to mediate a resolution.

60. The dispute eventually progressed to the point where Faro and Ross were not properly communicating about the case, were making unilateral decisions without consulting the other, and were failing to provide each other with copies of documents and pleadings.

F. SCEC Discharges Faro

61. On May 14, 2003, Faro advised SCEC that the rift in the working relationship between Ross and him was irreconcilable. On the same date, Faro sent Ross a letter purporting to discharge Ross from further representation of SCEC (the "Ross Discharge Letter"), citing Ross's refusal to provide Faro with copies of certain pleadings, and Ross's refusal to coordinate and cooperate with Faro in the prosecution of Fed II. Faro accused Ross of attempting to "extort" a better agreement for himself at the expense of the client. This discharge was done without SCEC's approval. Upon learning of the Ross Discharge Letter, Smith instructed Faro to withdraw the letter.

62. To resolve the fee dispute between Faro and Ross, SCEC resorted to drafting its own proposed revision of the Engagement Letter that was sent to

Faro and Ross on May 23, 2003. (Ex. AA) SCEC's proposal retained the original one-third contingency amount but specified that Ross and Faro would divide that amount on a 55% to 45% basis after deducting an initial 5% of the "recovery or settlement" for Ross's work in overseeing the appeals. SCEC's memo believed this arrangement to be "fair and clearly states your client['s] desires regarding our roles on the team." The proposed revision would have superceded the original Engagement Letter that it expressly acknowledged had been in existence since May 1997. Neither Faro nor Ross, however, ever accepted those terms.

63. Faced with a continued stalemate, and in another attempt to resolve the discord between Faro and Ross, SCEC authorized its corporate counsel Beck to meet with them to mediate their dispute over the division of the contingency fee. That meeting took place on June 12, 2003 at the offices of SCEC.

64. According to Beck, Faro was willing to work things out with Ross and continue their working relationship, but Ross refused any such resolution. In fact, immediately after the June 12, 2003 meeting, Beck spoke with Ross alone, at which time Ross told Beck that he refused to continue working with Faro. For his part, Faro claimed in his June 18, 2003, letter that he could continue to work with Ross. (Ex. 9 at 3) Faro insisted that the dispute could be resolved based upon a percentage of the one-third contingency contemplated by the May 1997 Engagement Letter.

65. On or about June 19, 2003, Ross gave SCEC an ultimatum: either discharge Faro, discharge Ross or discharge both of them. Either way, Ross made clear to SCEC, through Smith, that he refused to continue

working with Faro. This was due in part to Ross learning that day that Faro had hired an investigator to examine documents relating to Ross's divorce in order to obtain information that might undermine Ross with SCEC. During that meeting, Ross did not advise Smith as to what the legal effect would be of terminating Faro for cause or on what fee would ultimately have to be paid to Faro.

66. Faced with Ross's displeasure over the divorce investigation and the fee dispute, SCEC decided to discharge Faro. At that point in time, the discovery cut-off deadlines in Fed II were fast approaching, expert reports were due soon, oral argument in the appeal filed in the Fed 1 case was less than six weeks away, and the Fed II trial was set for October 14, 2003. Although SCEC discharged Faro, it clearly would not have done so had Ross not issued his ultimatum. SCEC's representatives clearly testified to that fact and the record evidence in the case supports that finding. Thus, from SCEC's perspective, Faro was not discharged "for cause" as that term is used in Florida attorney fee law.[6]

67. SCEC discharged Faro by letter dated June 23, 2003 (the "Faro Discharge Letter"). (Ex. DD) The Faro Discharge Letter stated, however, that Faro was being discharged for cause due to the "disharmony" that had occurred between Faro and Ross.[7]

68. On two occasions following Faro's termination, June 23 and 25, 2003, Ross presented SCEC with a draft written agreement to indemnify SCEC against Faro's charging lien. (Ex. 6) That draft agreement contained very different provisions than the draft agreements Ross had drafted back in March 2003 when

Faro was still involved in the case. This draft obviously contemplated that Ross receive the entire 33 1/3 contingency fee in the litigation, in exchange for an indemnity provision that held SCEC harmless for any Faro fee claim "in excess of one-third of an aggregate one-third of the judgment." (Ex. 6 at 3). Ross's proposed indemnity agreement also provided, however, that SCEC would be obligated to pay a contingency fee that "may be considered as a *contingent ownership interest in the said patents in the event of settlement*" -- a provision that had never before been included in the May 1997 or March 1998 agreements or Ross's agreements drafted in March 2003. (Ex. 6 at 1 (emphasis added))

69. SCEC never accepted Ross's offer to enter into this new revised engagement contract even though it indemnified, partially, SCEC from Faro's lien. SCEC never agreed to any written engagement contract with Faro or Ross that conveyed a contingent fee ownership interest in SCEC's patents to the lawyers. As Smith explained at the hearing, SCEC was happy with the agreement that it already had with its lawyers.

70. After Faro was discharged, Ross took over the Fed II litigation. Before that point, Ross had taken a back seat role in that case, as agreed by both Faro and SCEC. He billed far fewer hours on Fed II than he had billed for Fed I (only about 164 hours from March 2002 through June 2003). Then after he took over the handling of the case from Faro, he billed approximately 377.6 hours until the case was settled in November 2003 -- more than twice the number of hours in a much smaller period of time.

71. The bulk of the day to day work on Fed II prior to June 2003 was being handled by Faro. After his discharge, SCEC realized that the handling of discovery in that case had been deficient, which hampered SCEC's experts' ability to prepare their timely expert reports and, ultimately, prepare the case for trial. After Ross took over, much work was left to be done to get the case ready for trial.

72. At the same time, Ross was handling the appeals process in Fed I, including the oral argument before the Federal Circuit. Ross was also handling the state litigation against the FDOT. Thus, Ross had to take on more responsibility after Faro's discharge than he had been undertaking previously. On the other hand, throughout the entire period of this litigation Ross had never relinquished his position as lead counsel in *both* Fed I and Fed II. He was, therefore, equally responsible for any problems that were being incurred in the litigation even if Faro was primarily responsible for the work in Fed II.

G. SCEC Settles the Litigation After Fed I is Remanded

73. Before Faro was discharged, in March 2003, SCEC entered into a retainer agreement with the firm of Young, Van Assenderp, Vernadoe & Anderson, P. A. ("the Young Firm") to act as lobbyists for SCEC in an attempt to reach a political resolution to the ongoing patent litigation.

74. The Young Firm was hired because SCEC believed it had direct access to the decision makers at the FDOT to discuss settlement of the patent litigation. The Young Firm had existing relationships with key FDOT decision makers, including FDOT Secretary

Abreu, with whom they were able to discuss settlement directly. SCEC agreed to pay the Young Firm $ 20,000 per month to effectuate a settlement with the FDOT. [8]

75. Faro and Ross could ethically not have had direct access to the decision makers at the FDOT. Any settlement discussions they had throughout the litigation would have been with the FDOT's or the other named defendants' counsel. After five years of litigation, Faro and Ross had not he able to settle the litigation on SCEC's behalf, even after the very successful jury verdict in Fed I. There is no evidence that settlement was at all realistically possible in March 2003.

76. Ross did not agree with SCEC's decision to hire the Young Firm, nor with the strategy that SCEC was attempting to take by doing so. Ross believed that this was conflicting with his ongoing efforts to settle the litigation himself.

77. SCEC refused to terminate its relationship with the Young Firm. Indeed, SCEC ultimately instructed Ross to cease his own attempts to negotiate a settlement of the litigation. SCEC entered into a second agreement with the Young Firm in July 2003.

78. In the meantime, Ross continued his work defending the Fed I judgment and prosecuting Fed II and the State Court Action. Ross presented oral argument to the Federal Circuit Court of Appeals on August 5, 2003. Ross also worked on preparing Fed II for trial.

79. Negotiations with the FDOT and the Young Firm accelerated in September and early October. 2003. SCEC's attitude toward the negotiations were influenced by the fact that it had lost confidence in its

legal representation due to the breakup of the legal team and concerns about preparedness for the Fed II trial scheduled to begin on October 14, 2003.

80. There were positive developments for SCEC in the Fed II litigation after Faro's discharge. On October 6, 2003, for instance, the District Court entered an order in Fed II that provided a favorable construction of the patent claims pursuant to a *Markman* hearing held in that case, and denied the defendants' motions for summary judgment on patent invalidity and non-infringement. (D.E. 188)

81. Yet, there can be no question that SCEC's position in the litigation was negatively affected by the outcome of the appeal of the Fed I judgment. On October 7, 2003, the Federal Circuit affirmed in part and reversed in part the District Court's August 2002 amended final judgment. (D.E. 423, 426) The District Court's opinion affirmed many aspects of the judgment, including the jury's royalty calculations and the District Court's grant of judgment against SCEC on the issue of willfulness. The Federal Circuit, however, reversed and remanded the case in a material respect. The Federal Circuit first found that the District Court had erred in not adequately construing the claims to the patents prior to the trial. Second, the District Court's grant of judgment in SCEC's favor on the defense of invalidity was also reversed. According to the Federal Circuit, there were several factual questions that remained in the case with respect to the obviousness of the patents in suit that should have been decided by the trier of fact, not by the court on a *Rule 50* judgment.

82. The outcome of the appeal of Fed I, therefore, left SCEC in the position of having much work left to

be done before they could enforce the patents against those original defendants, the FDOT, as well as the defendants in Fed II. A trial remained to be conducted on remand in Fed I on the obviousness issue, and a more expansive trial remained to be conducted in Fed II. This development in the litigation also played a part in SCEC's decision to settle all their patent claims.

83. On the eve of the Fed II trial and one week after receiving the Federal Circuit's decision in Fed I, SCEC, through the Young Firm, negotiated and executed a settlement agreement with the FDOT (the "Settlement Agreement"), settling all claims relating to the patent litigation, (Ex GG), which included the following:

> a. The FDOT agreed to pay SCEC $ 8,000,000 and the parties agreed to dismiss all the pending lawsuits and appeals (*i.e.* both Fed I and Fed II).
>
> b. The FDOT would include SCEC's Integrated Post System on its list of approved sound wall systems, and would no longer instruct contractors not to pay SCEC a royalty should said contractor elect to use SCEC's system. That meant that SCEC could now license its patents for the construction of sound wall projects for FDOT construction jobs and earn a license fee or royalty pursuant to any such license. SCEC could also subcontract to other contractors the construction of sound walls built in accordance with its patents for FDOT construction jobs, which SCEC was previously prohibited from doing by the

FDOT while the patent dispute was still pending.

c. Finally, SCEC agreed to waive any and all claims that any of the then -- existing sound wall systems approved by the FDOT, and contained in the FDOT standards or index, infringed the Patents.

84. The Settlement Agreement was executed on October 15, 2003. As a result of entering into the Settlement Agreement and resolving its claims, the contingency described in the Engagement Letter and Amendment Letter ("a contingent fee . . . against recovery at the time of settlement.") accrued.

85. The District Court entered its Final Order of Dismissal with Prejudice on October 15, 2003. (D.E. 422)

H. Ross and Faro File Charging Liens on the Settlement Proceeds

86. The Settlement Agreement did not address any issue involving the allocation of settlement monies among SCEC's attorneys.

87. Following execution of the Settlement Agreement and a conversation between Ross and SCEC, through Transleau, SCEC prepared a letter on October 17, 2003, setting forth its understanding of what attorney's fee was owed after the settlement. Transleau believed that the fee due was one-third of the $ 8,000,000 recovery, less fees paid to date (approximately $ 450,000) to be divided between Faro and Ross. (Ex HH) SCEC assumed and intended that Faro would receive his portion of the one-third

contingency fee after he and Ross resolved their dispute.

88. By letter dated October 17, 2003, Ross responded to Transleau's letter, indicating that he would discuss the matter with Faro, but reserving his claim of entitlement to a portion of SCEC's future use and licensing revenues of the patented method. (Ex. II) This was the first time that this reserved "claim" had ever been presented in writing to SCEC by either Faro or Ross in any way. SCEC first learned of this interpretation was sometime in September 2003 when Ross, in a meeting with Smith, commented that Faro had an "interesting take" on the "value of the settlement" language in the Engagement Letter.[9] Ross explained that Faro believed the lawyers would be entitled to one-third (1/3) of the future income derived by SCEC from the use of the patents.

89. Ross himself did not assert this position until a meeting with Smith and Transleau on the day that the Settlement Agreement was finalized, at which time he asserted that he was also entitled to one-third (1/3) of the future value of the use of the patents.

90. SCEC did not agree to pay Ross, or Faro, anything greater than what was stated in the October 17th letter.

91. Following the District Court's dismissal order, Ross moved to intervene in the action to adjudicate Faro's charging lien, arguing that Faro's charging lien should be discharged in order for the Clerk of the Court to disburse the $ 8,000,000 settlement monies to SCEC and Ross. (D.E. 424) The District Court granted the motion to reopen the case to adjudicate the charging lien issue, but referred the motion to intervene and

adjudicate Faro's charging lien to the assigned Magistrate Judge. (D.E. 425)

92. In advance of a hearing before this Court on Ross's motions, Ross filed on January 7, 2004, a charging lien on his own behalf. (D.E. 446) At the same time, after a hearing held before this Court, it was agreed that Ross's interest in the case would not require his intervention as a party. Accordingly, Ross's motion to intervene was denied as moot on January 12, 2004. (D.E. 449)

93. The three parties in the charging lien proceedings -- Faro, Ross, and SCEC -- conducted discovery to prepare for an evidentiary hearing. In the midst of that process, SCEC and Faro reached an agreement to resolve Faro's charging lien in the case. A Stipulation for Dismissal of Faro's charging lien was filed on February 26, 2004. (D.E. 488) After initial objection from Ross, all three parties ultimately stipulated to the dismissal of Faro's charging lien by the undersigned Magistrate Judge and the disbursement of $ 1,100,000 from the Court registry payable to Faro. (D.E. 508) With Faro's charging lien no longer at issue, only Ross's charging lien remained to be adjudicated over the $ 6,900,000, plus interest, in the Court registry in connection with SCEC's settlement of the litigation.

* * *

II. CONCLUSIONS OF LAW

A. Basic Principles for Enforcement of Charging Liens

"Federal courts, although they recognize no common-law lien in favor of attorneys, give effect to the

laws of the states in which they are held." *Gottlieb v. GC Financial Corp., 97 F. Supp. 2d 1310 (S.D. Fla. 1999)* (citing *Webster v. Sweat, 65 F.2d 109, 110 (5th Cir.1933))*; *accord Zaklama v. Mt. Sinai Medical Center, 906 F.2d 650 (11th Cir. 1990)* (the rights and obligations of parties to a contract that provides for attorneys' fees upon the happening of a contingency are governed by state law). Under Florida's common law, a charging lien may be utilized to enforce the equitable right of attorneys to have costs and fees owed for legal services secured by the judgment or recovery in a lawsuit. *See Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P. A. v. Baucom, 428 So. 2d 1383, 1384 (Fla. 1983)*; *Flynn v. Sarasota County Pub. Hosp. Bd., 169 F. Supp. 2d 1363, 1368 (M.D. Fla. 2001)*. "No statutes outline the requirements for valid attorney's liens in Florida. Rather case law acts as the sole guide for both attorneys and courts as to these liens." *Daniel Mones, P.A. v. Smith, Inc., 486 So. 2d 559, 561 (Fla. 1986)*.

All proceedings in Florida to resolve an attorney's charging lien for legal services are equitable in nature. *See Nichols v. Kroelinger, 46 So. 2d 722 (Fla. 1950)*. Thus equitable defenses to an action in equity, such as unclean hands or the adequacy of a remedy at law, may be asserted in a charging lien case. *E.g., Scutieri v. Estate of Philip Revitz, 829 F. Supp. 387, 392 (S.D. Fla. 1993)*. And, to impose a charging lien, a court in equity must find: (1) an express or implied contract between the attorney and client; (2) an express or implied understanding that payment is either contingent upon recovery or will be paid from the recovery; (3) an attempt by the client to avoid paying or a dispute as to the amount of the fee; and (4) a timely notice of a

request for a lien. *E.g., Sinclair, 428 So. 2d at 1385; Gottlieb, 97 F. Supp. 2d at 1311.*

This case requires primarily an analysis of the first two prongs of this test. There is no dispute that this matter has arisen from SCEC's refusal to pay the attorney's fee claimed by Ross stemming from the settlement of the litigation. There is also no dispute that Ross gave timely notice of his lien.[10] There is, however, clearly a dispute between the parties as to the first two prongs of the stated test for enforcing a charging lien. Ross takes the position that he had an enforceable contract with SCEC for a hybrid contingency fee in the case. SCEC counters with the argument that Ross and SCEC never had an enforceable contract in the litigation for Ross to be SCEC's attorney. And even if a contract did exist between SCEC and Ross that arose from its contract with Faro, SCEC contends that such contract was unenforceable as a matter of law, [*42] thereby leaving Ross with only a quantum meruit recovery.

With respect to whether the parties agreed to a contingent fee in this case, Ross contends that it had a contingent fee agreement and that the value of that agreement must take into account the overall benefit that SCEC obtained through the litigation, beyond just the settlement payment SCEC has received. Ross, therefore, requests a total fee of $ 6,855,806.00. SCEC disagrees, contending instead that, if Ross is entitled to anything more than a quantum meruit recovery, he can recover only one-half of a one-third contingency on the $ 8 million SCEC obtained in the settlement -- a little more than $ 1 million.

B. The Validity of the Contingent Fee Contract Between Ross and SCEC

Based upon the evidence presented at the hearing and the law, there is an enforceable contingency fee agreement between Ross and SCEC. First, Ross is a party to the agreement based upon the express terms of the Engagement Letter, as amended, and the implied terms of the agreement as confirmed by the parties' course of performance. Second, Ross's contingent fee agreement is enforceable notwithstanding SCEC's defense that Faro and Ross violated the Rules Regulating the Florida Bar.

I. Ross is a Party to the Contingent Fee Contract with SCEC

As is true for any contract, the interpretation of a contract for legal services requires an examination of the plain language of the purported agreement. *Eakin v. United Tech. Corp., 998 F. Supp. 1422, 1432 (S.D. Fla. 1998).* The plain language of the Engagement Letter and the Amendment Letter provide that Faro and his co-counsel Ross "are agreeable" to represent SCEC for a reduced hourly billing fee plus a contingent fee "against recovery at the time of settlement" that would be no less than "one-third of the value of the settlement to your Company." Faro and Tim Smith for SCEC signed the Engagement and Amendment Letters. As the Court has found above, Ross did not sign and deliver to the client either Letter, at least at any relevant time.

"The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs -- not on the parties having meant the same thing but on their

having said the same thing." *Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957)*. In this case, there is little doubt as to either. There is no ambiguity in the language of these agreements with respect to the parties and the consideration under the contract. The parties were clearly Faro/Ross as attorneys and SCEC as client. The consideration was a hybrid contingent fee. The purpose of the contract was also clear from the face of these documents -- legal representation in connection with a patent infringement lawsuit. The parties to these agreements all intended to accomplish the same thing and the plain language of the agreements said the same thing. This is all certainly tangible and reliable evidence that supports the existence of a contract as a matter of law.[11]

SCEC's contrary position relies at the outset upon the fact that Ross did not sign the agreement; only Faro had a contingent fee agreement with SCEC. Strictly with respect to this argument, SCEC ignores two fundamental aspects of contract law. First, the absence of a signature on a contract among various parties is not dispositive. "Except where a signed contract is required by statute, or where the parties intend that the contract shall not be binding until it is signed, parties may become bound by contract even though they do not sign it." *James Register Constr. Co. v. Bobby Hancock Acoustics, Inc., 535 So. 2d 339, 340 (Fla. 1st DCA 1988)*. Thus, a Florida contract not signed by all of the parties, but otherwise valid, "may be upheld against a signing party, unless the nature or the wording of the contract indicates that his signature was conditioned upon all other parties signing the contract, or he can prove by parol evidence that when he signed the contract he made it known to the other

parties who now seek to sustain the contract that he only intended to be bound if all parties signed it." *Skinner v. Haugseth, 426 So. 2d 1127, 1131 (Fla. 2d DCA 1983).*

Here, as a matter of contract law, the absence of Ross's signature on either the Engagement or Amendment Letters does not constitute a defense on which SCEC can rely to avoid its obligations to Ross under the contract. At best, this would constitute a defense for Ross if he did not want to be bound by the contract. Clearly, the opposite is true. Because SCEC, however, never claimed that its signature on the agreements was dependent upon both Faro and Ross signing, SCEC is bound by the agreement that it signed.

Second, although none of the parties appreciated this in their respective briefs, it is highly relevant to the resolution of this dispute that Faro and Ross were in effect joint venturers under Florida law:

> The relation of joint adventurers is quite similar to that of partnership, and is governed by the principles which constitute and control the law of partnership. It is an elemental principle that the relationship of joint adventurers is created when two or more persons combine their property or time or a combination thereof in conducting some particular line of trade or for some particular business deal. There must be an agreement to share jointly on some agreed [*48] basis in not only profits but also losses. The relationship must arise out of a contract, express or implied. . . . The

> contract need not, however, be expressed or be embodied in a formal agreement, or particularly specify or define the rights and duties of the parties. It may be inferred from the conduct of the parties or from facts and circumstances which make it appear that a joint enterprise was in fact entered into. The consideration for a contract of joint adventure may be a promise, express or implied, to contribute capital or labor to the enterprise.

Kislak v. Kreedian, 95 So. 2d 510, 515 (Fla. 1957) (quoting *Proctor v. Hearne, 100 Fla. 1180, 131 So. 173, 176 (Fla. 1930)*); *see generally* 8B Fla. Jur.2d, *Business Relationships* § § 749-64 (West 2003).

Because the law of partnerships governs joint venturers, any party to the joint venture may bind the other party. "A contract of joint venture is in effect one of mutual agency, each joint venturer acting as a principal in his or her own behalf and as agent for his or her coventurers. The power between joint venturers to bind one another is inherent in the relationship, and each one of several joint venturers has the power to bind the others in matters that are strictly within the scope of the joint enterprise, but may not do so as to matters outside the scope of the joint enterprise." 8B Fla. Jur. 2d., *supra*, § 762; *see Kislak, 95 So. 2d at 516*; *Proctor, 131 So. at 176*; *Hayes v. H.J.S.B.B. Joint Venture, 595 So. 2d 1000, 1002 (Fla. 4th DCA 1992).*

Consequently, when Faro drafted the original Engagement Letter and sent it to SCEC, Faro was making an offer on his behalf and also as agent for his co-venturer Ross. Faro was bringing to the table his

client relationship and his patent expertise. Faro needed Ross for his patent litigation experience and his ability to serve as lead counsel. They jointly agreed to combine their resources to serve the client and agreed to be jointly responsible for the case. SCEC, by agreeing to this arrangement, retained the quasi-law firm of Faro and Ross on a contingent fee basis. Thus, contractually, Ross did not have to sign the agreement to be bound to its terms, and SCEC cannot rely on Ross's lack of signature to avoid its obligations under the agreement that it entered into with the Faro/Ross joint venture.

This precise type of legal joint venture does not appear to have been expressly adjudicated in a Florida published opinion. In other jurisdictions, however, a joint venture of two or more lawyers to represent a client has been widely recognized. *E.g., Kilgore v. Sheetz, 268 Ga. App. 761, 603 S.E.2d 24, 2004 WL 1516798 (Ga. Ct. App. 2004)*; *Fitzgibbon v. Henry A. Carey, P.C., 70 Ore. App. 127, 688 P.2d 1367 (Ore. Ct. App. 1984)*; *Duggins v. Guardianship of Washington, 632 So. 2d 420 (Miss. 1993)*; *Rogers v. Edwards, 413 F. Supp. 933 (D. Minn. 1975)*; *see generally 73 A.L.R.2d 991* § 3 (1960) ("Division of Fees or Compensation Between Co-operating Attorneys").

Furthermore, defects in the formalities of a lawyer's engagement letter, like the absence of a signature by Ross on the Engagement Letter, can be cured. For instance, a unilateral agreement lacking mutuality of obligation -- *i.e.* signed by the lawyer and not the client -- can become binding on all the parties upon the mutual performance of the agreement's respective obligations. *See McGill v. Cockrell, 88 Fla. 54, 101 So. 199, 201 (Fla. 1924)*; *Flynn, 169 F. Supp. 2d at 1370 n.6* (a valid fee

agreement consisted of an engagement letter signed by the lawyer, not the client, that was confirmed by the subsequent conduct of the parties).

Here, any doubt as to the creation of the contingent fee contract is resolved by the parties' mutual performance following the execution of the Engagement Letter. First, the Engagement Letter specifically provided that Ross would receive a retainer of $ 5,000 as an advance for his fees in the case and SCEC undisputedly paid that retainer. Second, Ross provided lead counsel services in the patent litigation for more than six years. In this regard, Ross acted as SCEC's counsel in four separate lower court actions filed in the patent litigation. Third, Ross was lead counsel at the trial of the Fed I case. Fourth, Ross performed all appellate work in the case up until the time of the settlement. Fifth, Ross billed SCEC in writing for all of his services and SCEC never objected to any of the bills. Ross clearly performed believing that he was bound by the Engagement Letter. (Findings PP 32-46)

SCEC also performed under the contract. SCEC paid Ross's monthly invoices. And those bills clearly were not for ancillary services performed for Faro; they were for the services of a lead trial lawyer that had primary responsibility over the litigation filed on SCEC's behalf. Furthermore, on at least two separate occasions, March 4, 2002 and October 17, 2003, SCEC expressly acknowledged the "original contract" and that the "disbursement amount for attorneys' fees" to Ross "is one third," precisely what the Engagement Letter provides. (Findings PP 43-44, 52, 87)

Finally, any remaining doubts are resolved by SCEC's execution of the Amendment Letter in March 1998. By that point in time, SCEC did not believe that Ross had ever signed the original Engagement Letter while he was acting as their lead counsel, nor did it expect that to occur. Yet, by entering into the Amendment Letter that acknowledged the existence and validity of the earlier Engagement Letter, SCEC forever ratified in writing Ross's retention as co-counsel on its behalf. Therefore, under the law Ross was a party to the contingent fee agreement that SCEC had with the joint venture of Faro and Ross. Ross has thus satisfied his burden of proving that he has a contingent fee contract with SCEC in order to meet the first prong of the requirements for a charging lien to be imposed in this case.

2. The Contingent Fee Contract is Enforceable Under Rule 4-1.5

When a contingency fee contract exists, an attorney employed under that contract in Florida is entitled to his fees pursuant to its terms and upon the occurrence of the contingency. *See, e.g., Milton Kelner, P.A. v. 610 Lincoln Road, Inc., 328 So. 2d 193 (Fla. 1976).* A "client may not accept the benefits of a valid contingent fee contract and subsequently contest his obligation thereunder." *See Zaklama, 906 F.2d at 653* ("the occurrence of the contingency prior to discharge of the attorney entitles that attorney to his stated fees pursuant to the contingency fee contract as opposed to quantum meruit") (citations omitted).

There is no dispute that Ross was representing SCEC at the time of the settlement and was never discharged prior to the occurrence of the contingency

on October 15, 2003. (Findings P 84). As Ross had a contingent fee contract with SCEC, Ross has satisfied his prima facie burden of showing that he is entitled to receive a contingent fee under the Engagement Letter.

SCEC argues, however, that Ross cannot recover a contingent fee even if he is a party to the Engagement Letter because it is an unenforceable contract under Florida law, based upon Faro and Ross's violations of the Florida Bar Rules of Professional Conduct, and specifically *Rule 4-1.5(f)* that relates to contingent fees.

Any contract in Florida that contravenes an established interest of society can be found to be void as against public policy. *E.g., American Casualty Co. v. Coastal Caisson Drill Co., 542 So. 2d 957, 958 (Fla. 1989); City of Miami v. Benson, 63 So. 2d 916 (Fla. 1953); Hialeah Gardens v. John L. Adams & Co., 599 So. 2d 1322, 1324 (Fla. 4th DCA 1992).* At the same time, the general freedom of parties to form a contract must generally be enforced. "Competent persons have the utmost liberty of contracting and when these agreements are shown to be voluntarily and freely made and entered into, then the courts usually will uphold and enforce them." *Wechsler v. Novak, 157 Fla. 703, 26 So. 2d 884, 887 (Fla. 1946).* This general proposition applies to attorneys and clients entering into a fee agreement because "as between a lawyer and his client the matter of the fee is one of contract between the two." *Lugassy v. Independent Fire Ins. Co., 636 So. 2d 1332, 1335 (Fla. 1994)* (quoting *Lyle v. Lyle, 167 So. 2d 256, 257 (Fla. 2d DCA 1964)).*

In support of its position SCEC relies upon a line of cases holding that a contingent fee contract that does not comply with the Bar Rules, and specifically *Rule 4-*

1.5, cannot be enforced by the lawyer seeking the contingent fee. *See Chandris S.A. v. Yanakakis, 668 So. 2d 180 (Fla. 1995)*; *Florida Bar v. Rubin, 709 So. 2d 1361 (Fla. 1998)*; *Florida Bar v. Carson, 737 So. 2d 1069 (Fla. 1999)*. *Rubin* and *Carson* clearly stand for the proposition that a Florida lawyer must strictly comply with the express provisions of the Bar Rules and their intended purposes. *Rubin, 709 So. 2d at 1364* ("These requirements must be diligently adhered and enforced in order to preserve public confidence in the legal profession."); *Carson, 737 So. 2d at 1072* (citing *Fla. Bar. R. 1-10.1*). *Rubin* and *Carson*, however, were both cases involving bar complaints filed against lawyers who grossly violated the Rules of the Bar, including *Rule 4-1.5*, and dealing with what disciplinary sanctions the lawyers should have received. *See also Florida Bar v. Hollander, 607 So. 2d 412 (Fla. 1992)* (lawyer reprimanded for drafting unenforceable provision in contingent fee contract that violated *Rule 4-1.5(a)*).

Chandris, on the other hand, dealt directly with the enforcement of a contingent fee contract between a client and his lawyers. In answering a certified question of Florida law from the Eleventh Circuit Court of Appeals, the Florida Supreme Court held that contingent fee contracts in Florida that do not comply with Florida Bar regulations are void and unenforceable as against the public interest. *668 So. 2d at 181.*[12] The Florida Supreme Court's decision in *Chandris* used undeniably sweeping language:

> We hold that a contingent fee contract entered into by a member of the Florida Bar must comply with the rule governing contingent fees in order to be enforceable.

> We have determined that the requirements for contingent fee contracts are necessary to protect the public interest. Thus, a contract that fails to adhere to these requirements is against public policy and is not enforceable by the member of the Florida Bar who has violated the rule.

Id. at 185-86. Consequently, SCEC argues that Ross cannot enforce his contingent fee contract with SCEC because he violated *Rule 4-1.5* in a number of ways, which independently or in combination render this fee contract unenforceable.

a. The Applicable Standard

The first issue to address in response to SCEC's defense is whether the Florida Supreme Court in *Chandris* intended that any violation of the Bar disciplinary rules, no matter how technical, renders the entire fee contract void and unenforceable. One could argue, as SCEC does here, that *any* violation of *Rule 4-1.5* renders a lawyer's contingency fee agreement unenforceable.[13] On the other hand, Ross argues that *Chandris* should be read more narrowly and limited to its unique facts.

The Florida Supreme Court has never directly addressed this precise question, other than to reiterate the general principle that the Bar rules are to be followed strictly. *See, e.g., Carson, 737 So. 2d at 1072.* More significant guidance can be found, however, in the Supreme Court's adoption of modifications to the Bar rules. *Chandris* involved the application of the old Code of Professional Responsibility, under Rule 2-106. *See Chandris, 668 So. 2d at 185 n.3.* The Code at issue in

Chandris was later replaced in 1986 by the Florida Rules Regulating the Florida Bar.

One early amendment to the Rules was the addition of *Rule 4-1.5(d)*, first enacted in 1987, that followed a Board of Governors special commission studying contingent fees and referral practices, and that was necessary in part to "to clarify standards by which reasonable legal fees are to be determined and to set limits on referral fees." *The Florida Bar re Amendments to The Rules Regulating The Florida Bar, 519 So. 2d 971 (Fla. 1987).* This new provision expressly addressed the "Enforceability of Fee Contracts" and provided that fee contracts would ordinarily be enforceable as follows:

> Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, *unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this Rule, or clearly excessive as defined by this rule.*

This Rule was never addressed in *Chandris* since it post-dated the contract at issue in that case. It is significant, however, that the Rule was never amended after *Chandris*. Although *Rule 4-1.5* has been amended several times, before and after *Chandris*, neither the Florida Bar nor the Court on its own initiative has amended the Rule in any manner relevant to this dispute. The Rule clearly embodies the Florida Supreme Court's current standard to apply in

determining whether a given fee contract is unenforceable in Florida.

Consequently, to render this contract unenforceable based upon a violation of *Rule 4-1.5*, one must find that the SCEC contract is "illegal," "prohibited by this rule." or seeks a fee that is "clearly excessive as defined by this rule." These threshold factors plainly require more than a merely technical or immaterial violation of *Rule 4-1.5*.

Support for this proposition can be found in the Florida appellate cases decided after *Chandris* that are entirely consistent with this approach.[14] In the few cases where contingent fee agreements were held unenforceable the claimed violations clearly satisfied the *Rule 4-1.5(d)* threshold.[15]

Cases where Florida courts have held fee contracts enforceable have also effectively applied the higher threshold required by *Rule 4-1.5(d). See Lackey v. Bridgestone/ Firestone, Inc., 855 So. 2d 1186 (Fla. 3d DCA 2003), rev. denied, 870 So. 2d 822 (Fla. 2004); Franklin & Marbin, P.A. v. Mascola, 711 So. 2d 46 (Fla. 4th DCA 1998); Corvette Shop & Supplies, Inc. v. Coggins, 779 So. 2d 529, 531 (Fla. 2d DCA 2000).*

The recent decision in *Lackey* is very instructive. A client retained a lawyer to file a personal injury lawsuit. A written contingent fee contract was signed by the client. The retained lawyer then referred the case to a lawyer with great expertise in the area, Mike Eidson from the Colson, Hicks firm, who in turn retained an out-of-state lawyer, Turner, to work on the case as well. Eidson and Turner met with the client and represented her in pursuit of a settlement, but never entered into a separate written contingent fee contract or had the

originating lawyer modify his retainer contract to include them as co-counsel. *Id. at 1187-88.* After a settlement was reached, the client balked at the contingent fee, arguing that it was excessive, that the contract contained unenforceable provisions, and that she never signed any contract with Eidson and Turner. *Id. at 1188.* The trial court nevertheless awarded the full contingent fee to the three lawyers do be divided between them.

Judge Shevin's opinion affirmed the trial court in part and held that although there were provisions of the contingent fee contract that violated the Florida Bar Rules those clauses were not so related to the contingent fee requested to render the entire contract void and unenforceable (at least with respect to the attorney originally retained by the client in writing). "This is not a case where an attorney is seeking to recover fees under a void provision in a contingent fee agreement. . . .We will not hold that the inclusion of the unenforceable terms voids the entire contract." *Id.* (citing *Chandris* and *King, supra*). The opinion expressly contrasted that situation with *Chandris* where the rule violation -- unauthorized practice of law -- rendered the entire contract void by its very nature. *Id.*[16]

Similarly, the Fourth District Court of Appeal in *Franklin & Marbin, P.A. v. Mascola* concluded that, while a fee agreement was believed to be out of proportion to the work required, a court could not rely upon a perceived violation of the intent of *Rule 4-1.5* to re-write an otherwise valid fee contract. *711 So. 2d at 46.* Based upon *Rule 4-1.5(d)*, "in the absence of a legal determination by the court that the fee contract is illegal, prohibited or excessive," the lawyer is entitled

to his contract fee. *Id. at 52* (holding that lawyer could maintain breach of contract claim to obtain his fee contract).

Therefore, under Florida law, before a fee contract is deemed unenforceable a court must expressly find that the alleged violations are material and substantial, not merely technical or insignificant, such that they render the agreement illegal or otherwise prohibited by the Rule. When only an immaterial part of a fee contract contains clauses that are contrary to the Bar rules, and it is possible to sever such clauses to render the remaining contractual terms enforceable, a court should do so provided the intent and purposes of the Bar rules are satisfied and the public interests of the State of Florida are preserved.

Although by no means dispositive, this interpretation of Florida law as it relates to *Rule 4-1.5* is entirely consistent with how that rule has been applied in other jurisdictions.[17] The underlying theme to all these cases is that *Rule 1.5* should be enforced in a way that preserves the parties' contractual rights but also furthers the paramount intent of the rule -- protecting clients from material violations of the Bar rules. *Compare Corvette Shop & Supplies, Inc. v. Coggins, 779 So. 2d 529, 531 (Fla. 2d DCA 2000)* ("While we recognize that strict compliance with the rule is always prudent, we nevertheless conclude that the rule is intended to protect the client and is not intended to shield a nonprevailing party from the payment of attorney's fees."), with *Post v. Bregman, 707 A. 2d 806 at 819, 349 Md. 142 (1998)* (court must examine the nature of the violation and determine, in part, "whether the client, in particular, would be harmed by enforcing the agreement, and, in that regard, if the agreement is

found to be so violative of the Rule as to be unenforceable").

b. ***Eakin v. United Technology Corp.***

After determining the proper standard to apply, but before applying that test here, the Court should stop to address Ross's heavy reliance on Judge Hoeveler's decision in *Eakin.* Ross argues that SCEC's unenforceability defense should be rejected entirely based upon this Southern District of Florida case that held that a client could not invoke the Bar Rules as a means to void his contingent fee contract with his lawyer. *998 F. Supp. at 1428-29.*

In *Eakin,* a client entered into a written contingency fee contract with two lawyers to represent him in a personal injury lawsuit pending in the Southern District of Florida. The lawyers and the client executed a written contingency fee agreement that called for a 30 percent contingent fee on the "recovery" in the lawsuit. The lawyers agreed to split that contingent fee on a 70/30 basis, which allocation was spelled out in the fee agreement. Before the scheduled trial, the parties reached a monetary settlement; however, due to the presence of a lien claimant that complicated the transaction, the parties never fully documented that settlement. While the lien issue was being adjudicated in furtherance of the settlement, the relationship between the client and his lawyers deteriorated, so much so that the lawyers moved to withdraw due to irreconcilable differences. The lawyers also filed charging liens seeking their 30 percent contingent fee from the settlement proceeds. *Id. at 1424, 1428.*

The client objected to the charging liens on various grounds, one of which was the argument that the fee contract was unenforceable based upon violations of *Rule 4-1.5*. Specifically, the client alleged that the 30 percent fee was excessive given the lawyer's work involved, that *Rule 4-1.5(f)(4)(D)* was violated because the 70/30 split fee was grossly disproportionate to the work that each lawyer performed, and that the secondary lawyer never agreed to assume joint responsibility over the case. *Id. at 1428*. Judge Hoeveler, however, rejected the argument that the fee contract was unenforceable, relying primarily upon the Preamble to Chapter 4 of the Bar Rules that provides that "violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . [The Rules] are not designed to be a basis for civil liability." *Id. at 1429* (also citing *Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., 655 F. Supp. 1571 (S.D. Fla. 1987), aff'd, 846 F.2d 753 (11th Cir. 1988)*). "Accordingly, the Court finds that Eakin has no basis for invoking the [Bar Rules] as a means to void an otherwise valid contract." *Id.*

Ross consequently reasons that SCEC's defense based upon violations of *Rule 4-1.5* is also precluded by the Preamble to the Rule and *Eakin*. The problem with that wholesale argument, however, is that *Eakin* never cited or distinguished *Chandris*. It is unclear from the face of the opinion how the Court reconciled *Chandris's* holding -- that violation of the Bar Rules could render a fee contract unenforceable -- with its reliance on the Preamble to the contrary.[18]

Eakin cannot, therefore, preclude further consideration of SCEC's unenforceability arguments in

this case. Here, an alleged Rule violation is being raised by a client in defense of a lawyer's fee. Clearly, a client does have standing to challenge its attorney's contingent fee contract, especially where the client is claiming to be prejudiced by the attorney's violation of the Bar Rules. *Eakin* notwithstanding, such a dispute does indeed trigger a further inquiry under *Chandris* and *Rule 4-1.5(d)*, as other cases from this Circuit reaffirm. *See, e.g., Foodtown, 102 F.3d at 485* (attorney fee award for prevailing party could not utilize contingency risk factor where *Rule 4-1.5* was violated); *Florida Ins. Guar. Ass'n, 681 F. Supp. at 810 (King, J.)* (same).

c. This Contingent Fee Contract is Not Illegal

With respect to this contingent fee contract, the first argument raised by SCEC relates to Ross's failure to sign the contract at any relevant time. This Court has found that Ross did not deliver a signed copy of the Engagement Letter to SCEC at any relevant time prior to the occurrence of the contingency. (Findings P 37) SCEC makes much of Ross's failure to sign the contract and the glaring inconsistencies in his testimony with regard to when and how he signed it. Thus, based on these findings, there is an apparent violation of *Rule 4-1.5(f)(2)*.[19] The intent behind this requirement is obvious; if you as a lawyer want to participate in a contingent fee the client must be on notice in writing of your involvement and expressly authorize the arrangement. *See Lackey, 855 So. 2d at 1188.*

The issue here is whether Ross's violation of *Rule 4-1.5(f)(2)* is such a material and substantial breach of the Rule that it renders his entire contingent fee interest

unenforceable. SCEC's argument would be more considerable if SCEC was in the situation that the client in *Lackey* was in: the client retained one lawyer in writing, who then independently retained two other lawyers without the written acknowledgment and consent of the client. *Id. at 1187.* SCEC is in a different position, as if the client in *Lackey* had signed a written agreement with the first lawyer that expressly provided that the two other lawyers would be retained and share in the contingent fee.

Thus, the Rule violation involved in this case is far more insubstantial. This case does not involve a fee contract that should be voided in its entirety because *the client* never signed the fee agreement. *E.g., Vista Designs, 774 So. 2d at 888.* SCEC approved in writing of Ross's participation in a contingent fee contract as its lead counsel -- *twice.* The Engagement and Amendment Letters were both written documents setting forth both Faro's and Ross's contingent fee interest even though SCEC could see that Ross was not supposed to sign either of them. SCEC also repeatedly acknowledged that interest in other written forms, both before the settlement and shortly thereafter. (Findings PP 36, 52, 62, 67, 87) SCEC also rejected any draft substitute agreement that materially changed the terms of the original Engagement Letter because it was "happy" with the deal originally struck with both Faro and Ross. (Findings 1152, 56, 69, 87) Therefore, the intent of *Rule 4-1.5(f)(2)* has been satisfied and no technical violation of that provision renders this contract unenforceable. [20]

The second and third purported Rule violations cited by SCEC relate to the fact the fee contract here did not expressly provide the method by which the fee

would be determined and the percentages that would accrue to Faro and Ross. Also, the contract did not provide what litigation expenses would be deducted from the recovery and whether such expenses would be deducted before or after the contingent fee is calculated. SCEC argues that, as a result, *Rules 4-1.5(f)(1)*[21] and *4-1.5(g)*[22] have been violated.

SCEC has not cited, however, any authority for the proposition that a violation of any of these provisions in this manner requires that the fee contract be voided as being illegal or prohibited. The Court has found none in Florida or anywhere else. Even if a rule violation has occurred, it is technical and immaterial to the enforcement of the fee contract as a whole.[23]

Here, the Engagement Letter indeed failed to comply with all the requirements of *Rule 4.1-5(f)(1)*. Although the written contract provided that the contingent fee was at least one-third of the value of the settlement to SCEC, the contract did not state with any specificity how the fee would be calculated at the time of settlement, trial or appeal. The contract purported to incorporate a schedule of fees contained within the Florida Bar rules, and even attached a copy of *Rule 4-1.5* that SCEC's President initialed. Yet, ambiguously attaching the Rule and referencing the "standard fees" that are actually designed for personal injury cases does not satisfy *Rule 4-1.5(f)(1)*.

However, such violations will not render the entire contract unenforceable as illegal or prohibited. Any prejudice to SCEC is easily remedied by the Court interpreting the infirm provisions in the contract against the drafter, Faro and his co-venturer Ross. *See, e.g., Arabia v. Siedlecki, 789 So. 2d 380, 383 (Fla. 4th*

DCA 2001) ("An attorney must be clear and precise in explaining the terms of a fee agreement. To the extent the contract is unclear, the agreement should be construed against the attorney."). Because the contingency fee provision did not delineate how the one-third contingency fee was to be calculated, the Court will apply that fee in the manner most favorable to SCEC. Similarly, because the lawyers here drafted the contract without indicating whether the fee would be on the gross recovery or the net recovery, the Court can interpret the contract in this regard in the client's favor and against the drafter. Any contingent fee in this case can be calculated on the client's net recovery, *i.e.* only on the amount of the recovery that is left after the litigation expenses are deducted. *See Eakin, 998 F. Supp. at 1434* (attorneys' failure to specify how contingent fee would be calculated required court to interpret contract in client's favor and calculate the fee after litigation expenses deducted).

With regard to *Rule 4-1.5(g)*, SCEC's unenforceability defense is even weaker. This provision is designed primarily for referral fees that are often negotiated in personal injury cases. In those cases, attorneys who are not in the same law firm may agree to divide a fee, but only if the division is proportional to the services rendered by each lawyer or, otherwise, by the written consent of the client when each lawyer assumes joint responsibility for the representation. Here, the Engagement Letter would have complied with the Rule had the written agreement specified how the contingent fee was to be divided between Faro and Ross. The contract did not do that. Under the Court's interpretation of the contract and the law, however, the division in this case is legally proportional to the

services performed by each of the lawyers involved. Consequently, there is no violation of this Rule in this case.[24] And, to the extent there is a violation, it clearly constitutes a technical violation that SCEC has little standing to enforce by voiding the contract. *E.g., Mary Jay Kaufman, P.A., 600 So. 2d at 1211* (court enforced fee-splitting contract between lawyers notwithstanding violation of *Rule 4-1.5(g)*).

That conclusion also applies to the final rule violation alleged in this case, relating to *Rule 4-1.8*.[25] SCEC argues that this fee contract is unenforceable because it did not fully detail what was intended by the term "value of the settlement" as the basis for calculating the contingent fee. This stems from Ross's attempt to include future use and licensing revenues on SCEC's patents as part of the recovery upon which to base a contingent fee. (Findings PP 88-90) SCEC believes that Ross is attempting to acquire an ownership or other pecuniary interest in its property that should have been fully disclosed in the Engagement Letter pursuant to *Rule 4-1.8*.

SCEC's argument is well taken but, again, not enough to void the entire contract. Instead, if Faro and Ross violated this Rule it would result in an unenforceable provision that will not inure to the benefit of the lawyers who drafted the agreement. *See, e.g., Flynn, 169 F. Supp. 2d at 1370* (failure to specify what was intended by "reasonable fee" in hourly fee agreement precluded recovery of any enhanced success fee). As is true with the other claimed Rule violations, SCEC cannot rely upon this technical violation to avoid its obligations to pay Ross a contingent fee in this case.

C. *The Effect of Faro's Discharge on Ross's Contingent Fee Interest*

The next issue to consider is SCEC's argument that Ross still cannot receive any portion of a contingent fee in the case because Ross's right to compensation under the contract extinguished in June 2003. SCEC reasons that, under basic principles of contractual rescission, and because Ross's right to a contingent fee was dependent on Faro's fee contract, once Faro was discharged by SCEC then the original fee contract expired. As a result, Ross is not entitled to a contingent fee; his right to compensation is limited to a quantum meruit recovery, just as if he had been discharged together with Faro. Under the law that governs this case, however, SCEC's position must be rejected.

When SCEC retained the joint venture known as Faro and Ross, SCEC contractually agreed to pay one contingent fee in the case to be divided between the lawyers who agreed to undertake joint responsibility over the case. As the Court found earlier, this gave rise to a legally enforceable joint venture. Faro and Ross performed their joint obligations under the contract with SCEC for six years based upon an express and implied agreement that they would share in the hybrid contingent fee or, conversely, in the loss of a contingent fee if the client recovered nothing in the litigation. This arrangement clearly satisfies each of the elements necessary for a joint venture to exist in Florida. *See Florida Tomato Packers, Inc. v. Wilson, 296 So. 2d 536, 539 (Fla. 3d DCA 1974); Nautica Int'l, Inc. v. Intermarine USA, L.P., 5 F. Supp. 2d 1333, 1342 (S.D. Fla. 1998).*

When a party to a joint venture can no longer perform its obligations to this special partnership, the clearest example of which is the death of the individual member, then the joint venture may be terminated and dissolved. *E.g., Cohen v. Lansburgh, 366 So. 2d 154, 156 (Fla. 3d DCA 1979).* However, the joint venture is not immediately dissolved where the joint venture continues to function for the purpose of winding up its affairs and disposing of its assets, and the responsibilities and rights of the venture's members will continue until a final disposition of all assets. *Id,* That is why even a deceased co-venturer continues to be responsible for his pro rata share of profits and expenses of the joint venture following his death. *Id.*; *see also Biers v. Sammons, 242 So. 2d 158 (Fla. 3d DCA 1970)* (holding that if a surviving or remaining partner continues the partnership business with the partnership assets, the remaining partner is required to account to the withdrawing partner).

These basic principles of joint venture relationships are often applied in the attorney joint venture context. For instance, courts have held that the estates of deceased lawyers who had been members of a joint venture are entitled to share in fee awards that were owed under contracts [*83] originally entered into by the joint venture. *E.g., Rogers v. Edwards, 413 F. Supp. 933, 936-37 (D. Minn. 1975).*

A good example of this is found in the recent case of *Kilgore v. Sheetz,* where the Georgia Court of Appeals was presented with a fee dispute involving a surviving lawyer that entered into a joint venture with a deceased lawyer to represent a client in various pieces of litigation. *268 Ga. App. 761, 2004 WL 1516798.* The deceased lawyer died after most of the legal work was

undertaken in the client's cases but before a final settlement was reached. The lawyers did not have an agreement that specified how the fees would be divided between them. The lead lawyer, Kilgore, did most of the work. Kilgore argued that as a result of the death of his co-venturer all the deceased lawyer's contractual relationships were terminated, and, thus, the only claim that the estate of the deceased lawyer had was against the client on a quantum meruit basis. *Id. at *1-4.*

The trial court disagreed and the Court of Appeals affirmed, holding that the estate of the deceased lawyer was indeed entitled to half of the contingent fee. "Contrary to Kilgore's contentions, [the deceased lawyer's] agreements did not evaporate when he died, as if they had never existed." *Id. at *7.* When Kilgore continued to represent the clients after his co-venturer's death, "he represented both his and the estate's interests in obtaining attorney fees" under the original fee contract. *Id.*[26]

In another analogous case applying this principle, the Illinois Court of Appeals enforced a contingent fee contract with a client that retained three attorneys to prosecute a trust action. *Kespohl v. The Northern Trust Co., 93 Ill. App. 2d 211, 236 N.E.2d 268 (Ill. Ct. App. 1968).* After one of the three lawyers died, the client did not rescind the contract and permitted the remaining attorneys to continue prosecuting the case. Yet, after the case's successful conclusion, the client refused to pay the surviving lawyers the contingent fee required under the original contract, arguing that it had been abrogated by the death of one of its parties. Because, however, the client continued to retain the joint venture and benefitted from that representation, the surviving lawyers and the estate of the deceased

lawyer retained the contractual right to share in the contingent fee. *Id. at 272.*[27]

Consequently, in this case Faro's removal as one of the members of this joint venture, which occurred when SCEC discharged him at Ross's insistence, did not render the original contingent fee contract a nullity. Rather, Faro's discharge left Ross in charge of winding up the joint venture's purpose (*i.e.* representing SCEC through final judgment/settlement) and accountable to Faro for any profits and losses garnered by their special partnership. At the same time, SCEC was still obligated to Ross as the surviving member of the joint venture under the original fee contract. SCEC, like the client in *Kespohl*, could have rescinded the entire agreement and found itself a new lawyer. SCEC chose instead to continue to utilize Ross's services under the original fee arrangement. SCEC, therefore, cannot benefit from those services by obtaining a monetary settlement, yet at the same time renege on its contractual obligations to pay Ross a contingent fee.[28] Faro's discharge did not abrogate Ross's contingent fee interest as a matter of law.

D. ***The Value of Ross's Contingent Fee Interest***

The next issue to consider is how to value Ross's contingent fee interest, as Faro's charging lien has already been discharged following his settlement with SCEC. Ross argues that he inherited the entire one-third contingency fee provided by the Engagement Letter. Ross also argues that the contingency fee is far more valuable than simply one-third of $ 8 million. Ross is wrong in both respects based in part upon the very same principles that the Court believes entitle him to share in any contingent fee in this case.

1. *Ross's Right to The Entire Contingent Fee*

Lawyers that enter into an enforceable joint venture to undertake representation of a client without an express agreement as to the division of fees share equally. *Nickerson, 469 S.E.2d at 209.* In other words, "without a specific agreement to divide profits in a manner other than equally, [lawyers] are entitled to an equal division unless there are exceptional circumstances." *Fitzgibbon v. Henry A. Carey, P.C., 70 Ore. App. 127, 688 P.2d 1367, 1372 (Ore. Ct. App. 1984); accord Carson v. McMahan, 215 Ore. 38, 332 P.2d 84, 86 (Ore. 1958);* [*88] *Phillips v. Joyce, 169 Ill. App. 3d 520, 523 N.E.2d 933, 941, 120 Ill. Dec. 22 (Ill. Ct. App. 1988)* ("In such an arrangement it seems reasonable to conclude that the parties considered themselves as partners in the venture, to share equally in the fees, because they each contributed or agreed to contribute something of value to the partnership'. "). On the other hand, where the parties to a fee agreement delineate how the profits are to be allocated, then that agreement should generally be enforced. *E.g., Scurto v. Siegrist, 598 So. 2d 507, 508 (La. Ct. App. 1992)* ("the agreement regarding division of the fee is a joint venture which gives the parties to the contract the right to participate in the fund resulting from the payment of the fee by the client").

Outside of the attorney fee context, Florida courts have routinely followed and applied this same basic principle. *E.g., Viking Realty, Inc. v. Balzebre, 535 So. 2d 687 (Fla. 3d DCA 1988)* ("The law is well-settled that parties to a joint venture, in the absence of any agreement to the contrary, share equally, not only in the profits, but also in the losses of the venture.") (citing *Florida Tomato, 296 So. 2d at 536* [*89] and Fla.

Stat. § 620.645, 755); *Lindberg v. Creative Constr. of Palm Beach, Inc., 522 So. 2d 467, 467-68 (Fla. 4th DCA 1988)* (partnership must share equally in the profits and losses unless otherwise agreed).

Here, there is no dispute that the text of the Engagement and Amendment Letters is silent on how Faro and Ross intended to allocate their shares of the contingent fee. There is also no evidence that the parties' conduct or course of performance revealed anything other than an equal fifty-fifty split of the contingency fee. Indeed, the opposite is true. Ross conceded that at the inception of the relationship Faro and he had a verbal understanding that the fee would be split equally between the two of them. (Findings PP 29-30)

Indeed, the discord between Faro and Ross began when Ross started insisting on a different division of the fee after the Fed I trial, due in part to Ross's belief that he was entitled to a greater portion of the fee based on his primary role as appellate counsel. Neither Faro nor SCEC, however, ever agreed to Ross's proposals to alter the original fifty-fifty split. (Findings PP 51-56) Thus, based upon the settled rule, the lack of any contrary agreement between the parties, and the parties' course of performance, Faro and Ross as a matter of law had to share equally in the contingent fee under their joint agreement with SCEC.

Ross argues, however, that he should be entitled to all or at least most of the contingent fee based upon equitable considerations as he did most of the work in the entire litigation. Ross also relies on the division of fees that the Bar Rules contemplate in a case like this, citing *Rule 4-1.5(f)(4)(D)*. Finally, Ross argues that to

deprive him of most of the contingent fee would be contrary to Florida law that prevents a discharged lawyer from receiving a quantum meruit fee out of any part of the contingent fee owed to the lawyer who was representing the client when the case settled.

Ross's position is untenable. First, his equitable argument is blunted by the fact that the lawyer's failure to fully comply with *Rule 4-1.5* led in great part to the current controversy. Had a division of their respective shares in the contingent fee been spelled out in the agreement then the prejudice that SCEC suffered from the initial bickering between the lawyers and now the protracted litigation over the Faro and Ross contingent fee would likely not have occurred. This case is a perfect example of what can go wrong when lawyers do not properly document an engagement contract with a client. Even assuming that Ross has an equitable argument to make due to his greater participation and importance to the overall litigation for SCEC, that argument is overwhelmed by the unfairness that has befallen his client, SCEC. The Court, sitting in equity, does not agree that the equities in this case lie with Ross.[29]

Second, Ross's reliance on *Rule 4-1.5(f)(4)(D)* as a basis to allocate the contingent fee on a 75-25 percent basis is flawed. That Rule, by its own terms, applies only to tort cases involving personal injury or property damage. It explicitly excludes other forms of contingent fee arrangements, especially those involving commercial disputes. Comment to Fla. Bar. *Rule 4-1.5* ("*Rule 4-1.5(f)(4)* should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context."). Therefore, the Bar Rules do not support Ross's

argument in the least that he is entitled to all or most of the contingent fee under his contract with SCEC. To the contrary, as the Court found earlier, Faro and his co-venturer Ross violated *Rule 4-1.5(f)* and *4-1.5(g)* by not expressly providing how the fee would be calculated in this case or what portion of the fee each lawyer was due. Although that violation will not require the Court to find the whole contract unenforceable, that violation clearly requires that Ross not obtain any better treatment than what the law normally allows. *See, e.g., Kilgore, 268 Ga. App. 761, 2004 WL 1516798 at *7.*

Third, Ross's reliance on cases involving the effect of discharged lawyers on the fee of the substitute lawyers is totally misplaced. It is true that when a client discharges a lawyer without cause prior to the occurrence of a contingency the client is still contractually responsible for the lawyer's fee on a quantum meruit basis (*i.e.* a reasonable value of the services rendered). *See Rosenberg v. Levin, 409 So. 2d 1016, 1021 (Fla. 1982).* When a client then enters into a second contingent fee contract with another lawyer, the client is responsible for paying that second lawyer's contingent fee in full, over and above what the client will be required to pay the original discharged lawyer. *E.g., Jones & Granger v. Johnson, 788 So. 2d 381, 383-84 (Fla. 1st DCA 2001), Adams v. Fisher, 390 So. 2d 1248, 1251 (Fla. 1st DCA 1980)* ("A client may end up paying fees in excess of the original contingent fee, once to the discharged attorney in quantum meruit and again to the substituted attorney on a new contingent fee contract."). The exception to this rule is where the client enters into a contract that expressly provides that the second lawyer's fee will be reduced [*94] by

whatever fee is due the first attorney. *Jones & Granger, 788 So. 2d at 384*; *Adams, 390 So. 2d at 1251*; *e.g., Afrazeh v. Miami Elevator Co. of Am., 769 So. 2d 399, 402 (Fla. 3d DCA 2000).*

That latter exception is what in essence applies in this case. The client here entered into a contract with two lawyers to undertake joint responsibility over the litigation. Unlike *Adams* or *Jones*, this is not a case where the client contracts first with one lawyer, and then later contracts with another following a discharge of the first. Here, the client is responsible to the original two lawyers only for the amount that it contracted. And, "as long as both attorneys have done some work on the case beyond signing and referring the client, the courts will not engage in the cumbersome task of evaluating after the fact the relative contributions made by the bickering attorneys." *Nickerson, 469 S.E.2d at 210* (lead lawyer had to share contingent fee on a fifty-fifty basis with disbarred lawyer).

Finally, it would be truly ironic if Ross's demand for the entire or majority of the contingent fee were approved when the reason for Faro's discharge was not client-driven, but was instead lawyer-driven. It was the bickering between the two lawyers that ultimately led to the discharge of one of them. (Findings P 66) That is a unique and regrettable situation that *Adams* and *Jones* do not contemplate. Ross's demand for the entire contingent fee, beyond his one-half interest the law normally imposes, must be rejected.

2. The Value of the Contingent Fee and "Recovery" in This Case

As Ross is entitled to share in only fifty percent of the contingent fee in this case, the final issues to resolve are what the actual value of that fee is and what the client's total recovery was under the contract. To answer these questions, the fee agreement must be strictly construed. *E.g., May, 700 So. 2d at 25.* Thus, where the terms of the fee agreement are not plainly clear and, instead, are vague and subject to interpretation, the terms should be construed against the drafter -- the lawyer. *E.g., City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000); Flynn, 169 F. Supp. 2d at 1371 n.7.* Moreover, when there is no express or implied agreement on the part of the client to pay anything more than what is plainly stated in the agreement, a charging lien claim cannot give rise to any such claim. *Flynn, 169 F. Supp. 2d at 1370.*

There is nothing plainly stated in this contingent fee contract as it relates to how to value the contingency. The Engagement Letter refers first to a contingent fee "as set forth in the current Standard Florida Bar Contingent Fee Schedule" less a credit for fees billed and collected. (Findings P 26) That suggests that the fee schedules provided in *Rule 4-1.5(f)(4)* were incorporated into this agreement. This conflicts, however, with the language that follows that says that "in no event would the amount of the net fee for representation be less than one third of the value of the settlement to your Company." (*Id.*)

After interpreting the ambiguity in favor of the client, the net one-third value should be applied. This conclusion is also supported by the parties' course of performance. SCEC believed that the contingent fee it agreed to was one-third of the total recovery. (Findings P 52, 62, 87) Ross agreed. (*Id.* PP 21, 88-89) SCEC

continues to take that position here (assuming that the contract is otherwise enforceable). Therefore, the Court will apply a total contingent fee of 33.33% on the total amount of the recovery. Ross will be entitled to receive one-half of that total percentage.

With regard to the value of SCEC's total recovery in the case, upon which the 33.33% percentage would be applied, the fee agreement here is, again, not clear. The only relevant language in the agreement is the "value of the settlement to your Company." (Findings PP 26, 36) SCEC argues that the only measure of the value of the settlement is the total amount of the settlement that SCEC obtained in the litigation -- the $ 8 million deposited in the Court registry. Ross, however, argues that the value of the settlement to SCEC must also include the present value of SCEC's future royalties derived on its patents.

A charging lien will not generally attach to anything other than the "tangible fruits" of the lawyer's services. *Correa v. Christensen, 780 So. 2d 220 (Fla. 5th DCA 2001)*. That means that "by definition, an attorney's charging lien cannot attach to property not involved in the suit and not before the court." *Cole v. Kehoe, 710 So. 2d 705, 706 (Fla. 4th DCA 1998)*; *see also Franklin & Marbin, 711 So. 2d at 53* (charging lien proceeding only applies when "identifiable property recovered as a result of the lawyer's labors"); *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A., 517 So. 2d 88, 92 (Fla. 3d DCA 1987)* ("the lien will attach only to the tangible fruits of the services").

The Court, therefore, agrees with SCEC. The only tangible evidence of what Faro and Ross procured for SCEC is the settlement and the $ 8 million payment

from the FDOT. That is the only identifiable property before the Court on which to attach a lien. SCEC never expressly agreed to a definition of "settlement" or "recovery" under the engagement contract with Ross that gave him the right to look beyond the face amount of a settlement payment SCEC obtained in the litigation. SCEC never impliedly agreed to such a result by anything that it did or said to Ross. Ross never even discussed with SCEC the subject of a contingency for future royalties on SCEC's patents until just before the case settled. Moreover, Ross implicitly acknowledged this when he unsuccessfully proposed a new agreement with SCEC late in the game that included language purporting to cover patent royalties as part of the contingency fee. (Findings P 68) Ross cannot, therefore, belatedly attach a lien onto an intangible and illusory interest in the patents even if they were the subject of the litigation. *See, e.g., Scutieri v. Estate of Revitz, 829 F. Supp. 387, 391 (S.D. Fla. 1993)* ("In the absence of statutory authority or an express contractual provision, an attorney's charging lien may not attach to a client's real property, even if the property was the subject of the litigation."); *cf. Flynn, 169 F. Supp. 2d at 1369-71* (vague term "reasonable fee" in engagement contract did not allow lawyers to obtain an enhanced fee based upon results achieved).

Moreover, to the extent that Faro and Ross originally intended to include future use revenues on the patents as an element of the "value of the settlement," they violated Bar *Rules 4-1.5(f)(1)* and *4-1.5(g)*. They should have obtained SCEC's express agreement to include future use revenues as part of the

contingent fee contract. This omission renders this element of Ross's contingent fee claim unenforceable. [30]

Accordingly, the "value of the settlement" in this case is limited to the $ 8 million settlement payment that SCEC obtained in the litigation. The contingent fee percentage of 33.33% will be applied to that amount. As explained earlier, the contingent fee should be applied only to the net recovery in this case (the $ 8 million less SCEC's litigation costs). *See Eakin, 998 F. Supp. at 1434*. There is no record evidence, however, as to the amount of those litigation costs incurred by SCEC. Moreover, SCEC did not specifically request that relief in its response to Ross's charging lien. Therefore, at this point in time the Court will find that the contingent fee will be applied to the gross recovery.[31]

3. Ross's Alternative Theory Based on the Number of Pleadings He Signed and Faro's Settlement with SCEC

Ross values his contingency fee in this case quite differently. Ross and his expert witnesses contend that the value of the contingent fee must take into account the "present value" of SCEC's settlement. This present value analysis is apparently necessary to measure the overall value of the $ 8 million settlement payout and the future use revenues that the litigated patents will purportedly yield. Ross concludes that the present value of the settlement can be determined using a "simple" mathematical formula based upon the amount that SCEC paid Faro to discharge his charging lien, $ 1,315,900. That formula, in short, provides as follows:

a. SCEC paid Faro $ 1,315,900.

b. Faro handled a much smaller percentage of the work in the case. Based upon a review of all the pleadings in the case, Faro signed only 18% of the pleadings. Thus, he did only 18% of the work.

c. Using inductive reasoning, if SCEC paid Faro $ 1,315,900 based on 18% of the work in the case, that means that the total "value" of the legal work in the case is $ 7,310,556.

d. The total fee due Ross, therefore, is $ 7,310,556 less the fees already paid to Ross, $ 454,750, for a grand total of $ 6,855,806.00.

Ross's alternative theory for valuing his contingent fee is deficient as a matter of fact and unsupportable as a matter of law. SCEC never agreed to calculate the contingency in that tortured manner, either in the original Engagement Letter or at any time thereafter. In the absence of contractual agreement, an attempt by a lawyer to arrive at an after-the-fact valuation of an attorney tee will not be upheld.

Ross's defense for this glaring deficiency is that this valuation is necessary in order to address the fact that the settlement is "back-loaded" and does not take into account the intangible benefits that SCEC will receive from this settlement. Ross, however, never introduced any evidence in the record of what those benefits really are beyond his mere speculation and the "enhanced" value of the patents -- patents that have never been finally adjudicated as valid or invalid. But even if Ross were correct, as explained above, he had to obtain the client's agreement in writing that he was entitled to obtain future use revenues on property that belonged

to the client. *See* Fla. Bar *Rule 4-1.8*; *see also Walsh v. Kelly, 28 Fed. Appx. 707, 2002 WL 92866 (9th Cir. Jan. 24, 2002)* (attorney entitled to receive a contingent fee based upon the value of the client's property *where the fee contract expressly provided for that contingency*).

Another reason why Ross's clever theory is meritless is that there is no precedent for apportioning an attorney's fee based upon the number of pleadings signed in a case. Ross cited none and the Court located none. One would think that the time and effort that Ross took in trying the Fed I case as lead trial counsel or in arguing the appeals in the case would have more value than how many pleadings he signed. In any event, Ross's reliance on the number of pleadings he signed is ultimately worthless when it comes to valuing his contingent fee in this case. It squarely runs up against the general rule that, absent an express agreement, attorneys that jointly represent a client share equally in the fee.

Ross also has no legal support for the proposition that one lawyer's settlement with the client provides a factual predicate to value a second lawyer's fee. The Court should note that it overruled SCEC's objections to Ross introducing the Faro settlement in the record.[32] But simply because the fact of Faro's settlement was technically admissible does not mean that the settlement can constitute a substantive basis to value Ross's contingent fee. Looking at this differently, had SCEC paid Faro only $ 100,000 to settle his charging lien, Ross obviously would not have argued that he was entitled to only $ 555,555 as his contingent fee. To the contrary, he would have argued, correctly, that Faro's settlement had nothing to do with the Court's valuation of his fee.

Finally, Ross ignores the fact that if the Court were to accept his logic then SCEC's argument that his contingent fee is unenforceable would have far greater merit. It is difficult to see how a $ 6.8 million fee for a recovery of $ 8 million could not be deemed "illegal" or "excessive." Fla. Bar *Rule 4-1.5(d)*. Accordingly, Ross's theory for valuing his contingent fee is a nonstarter.

E. The Final Calculation of Ross's Contingent Fee

Pursuant to the Court's analysis of the record evidence in the case and the application of Florida law to that evidence, Ross is entitled to his contractual contingent fee and not simply to a quantum meruit recovery. The contingent fee should be calculated as follows:

Total Amount of SCEC's Recovery:	$ 8,000,000.00
Total Contingent Fee Percentage:	33.33%
Total Contingent Fee Under Contract:	$ 2,666,666.67
Ross's Share of the Contingent Fee:	50%
Total Contingent Fee to Ross:	$ 1,333,333.34
Less Hourly Fees Already Paid to Ross:	(238,850.00)
Total Fee Owed to Ross on Charging Lien:	$ 1,094,483.34

Additionally, Ross is entitled to his pro rata share of the interest earned on the funds deposited in the court registry.

DONE and **ORDERED** at Fort Lauderdale, Florida this 25 day of October, 2004.

EDWIN G. TORRES

United States Magistrate Judge

Footnotes

n1 Exhibit references are to admitted exhibits that were marked alphabetically (for SCEC exhibits) or numerically (for Ross exhibits).

n2 The FDOT continued to used the patented inventions thereafter. Even though it had a standard regulation requiring contractors to obtain a patent license on all FDOT construction jobs that specified a patented device and to indemnify FDOT for any claim of infringement, the FDOT refused to pay State Paving or SCEC any royalty for the use of the patented inventions. (Ex. A, Section 7-3)

n3 See *State Contracting & Engineering Corporation v. State of Florida Department of Transportation*, CACE 98-006566 (17th Jud. Cir. Fla.).

n4 Ross claims to have signed the original Engagement Letter in June 1997. The evidence of that is conflicting, at best. No copy of that signed Engagement Letter ever surfaced throughout this litigation until after Ross prosecuted this charging lien proceeding. Only Ross claims to have had a copy of that signed letter, misplaced in his files, which copy was only found earlier this year. There is no dispute, however, that Ross never signed the Amendment Letter.

n5 *See State Contracting & Engineering Corporation v. State of Florida, 258 F.3d 1329 (Fed. Cir. 2001), cert. denied, 534 U.S. 1131, 151 L. Ed. 2d 974, 122 S. Ct. 1072.*

n6 *See, e.g., Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982).*

n7 After the discharge, Faro served a charging lien in the litigation on July 10, 2003, and an amended charging lien on September 9, 2003. (D.E. 411, 415)

n8 This was not the first time that SCEC resorted to third-party assistance in connection with the patent litigation against the FDOT. After the Fed I injunction had been entered, SCEC retained another attorney to file a bid protest against the FDOT after it had prohibited the use of SCEC's patented system. That bid protest resulted in a settlement with the FDOT that placed the SCEC system on the Qualified Product List for use in future projects, so long as SCEC was the prime contractor or subcontractor on the project. (Ex. T)

n9 Ross disputes this and maintains that the Amendment Letter constitutes evidence that SCEC and Ross/Faro entered into a royalty arrangement in March 1998. The Court finds to the contrary based upon Smith's testimony and the contrary record evidence.

n10 "In order to give timely notice of a charging lien an attorney should either file a notice of lien or otherwise pursue the lien in the original action." *Daniel Mones, 486 So. 2d at 561.* Although Ross here did not immediately file his charging lien at the time of the settlement in October 2003, Ross did clearly place SCEC on notice that he intended to seek the Court's intervention to obtain his disputed fee in response to Faro's charging lien that was filed prior to the settlement of the case. After the District Court dismissed the litigation, Ross moved to intervene in the case as a party to adjudicate Faro's lien and protect his own interests. Moreover, the parties ultimately

stipulated that the motion to intervene would be denied as moot in order for the Court to directly resolve Faro's lien as well as Ross's charging lien filed in 2004. *See* Findings of Fact PP 91-92 (hereinafter "Findings").

n11 *E.g., Barakat v. Broward Co. Housing Auth., 771 So. 2d 1193, 1194-95 (Fla. 4th DCA 2000)* ("it is a well settled principle of contract law that where the terms of a contract are unambiguous, the parties' intent must be determined from within the four corners of the document. In the absence of ambiguity, the language itself is the best evidence of the parties' intent and its plain meaning controls. Contracts are to be construed in accordance with the plain meaning of the words contained therein.").

n12 This case arose from a tortious interference claim filed by an out-of-state attorney and a Florida attorney retained by that lawyer against a defendant in a maritime personal injury case. The plaintiff/client discharged the lawyers and settled directly with the defendant in that case. The lawyers responded with a separate lawsuit against the defendant claiming that the defendant fraudulently coerced their former client into discharging them prior to the settlement. *Id. at 181-82.* The defendant raised, however, a defense that the original fee contract entered into between the client and out-of-state lawyer was unenforceable as a violation of Florida's rules against the unauthorized practice of law. *Id. at 182.*

n13 *See, e.g., Chandris, 668 So. 2d at 186* ("enforcing contingent fee agreements that are not in compliance with the rule would be unfair as well as constitute a competitive disadvantage to members of The Florida Bar who do comply with the rule"); *Baruch v. Giblin,*

122 Fla. 59, 164 So. 831, 833 (Fla. 1935) ("Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar.").

n14 It is well-established that where a state supreme court has not addressed an issue, a federal court applying state law is bound to conform its decision to the appellate courts' opinions absent evidence indicating that the state supreme court would decide otherwise. *See Media Servs. Group, Inc. v. Bay Cities Communications, Inc., 237 F.3d 1326, 1329 n.5 (11th Cir.2001)*; *Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983)*. This is the case even if a federal court does not agree with the state courts' reasoning or the outcome dictated. *Silverberg, 710 F.2d at 690, cited in Veliz v. Rental Service Corp. USA, Inc., 313 F. Supp.2d 1317, 1331 (M.D. Fla. 2003)*.

n15 *E.g., King v. Young, Berkman, Berman & Karpf, P.A., 709 So. 2d 572, 573-74 (Fla. 3d DCA 1998)* (hourly fee agreement included a "bonus fee" component in a divorce case for the results achieved at the conclusion of a dissolution action; contingent "bonus fee" was unenforceable under *Chandris* as it was expressly prohibited under *Rule 4-1.5(f)(3)*); *Vista Designs, Inc. v. Silverman, P.C., 774 So. 2d 884, 888 (Fla. 4th DCA 2001)* (oral contingent fee contract with out-of-state lawyer was never reduced to writing; the contract was

void ab initio as an illegal contract); *see also Foodtown, Inc. of Jacksonville v. Argonaut Ins. Co., 102 F.3d 483, 485 (11th Cir. 1996)* (affirming attorney fee award for prevailing party that did not include contingent fee multiplier where an oral contingent fee contract was never reduced to writing; per *Chandris*, law firm that does not ensure that a written agreement is executed "does so at its own risk"); *Figa v. R.V.M.P. Corp., 681 F. Supp. 806, 810 (S.D. Fla. 1988)* (attorney fee award for prevailing party could not utilize contingency risk factor where there was only an oral contingent fee contract never reduced to writing; this violation of *Rule 4-1.5* was "unconscionable").

n16 This reasoning, however, did not apply to attorneys Eidson and Turner who were retained by the first lawyer and never executed a contingent fee contract with the client. Based upon *Chandris*, "where [the client] never signed any agreement with Eidson and Turner, quantum meruit is the only recourse available to them." *Id.* With respect to these attorneys, their contingent fee claim against the client was unenforceable because the client never agreed in writing that they could share in a contingent fee. The trial court's fee order was reversed as to them. It is also noteworthy that the client in *Lackey* petitioned the Florida Supreme Court for review of the Third District's decision, arguing that it conflicted with the Supreme Court's blanket pronouncement in *Chandris* that violations of *Rule 4-1.5* render a fee contract unenforceable. The Supreme Court denied review earlier this year. *870 So. 2d 822. See* Brief of Petitioner on Jurisdiction, No. SC03-2030, at 4-7 (filed Dec. 16, 2003).

n17 *See, e.g., Post v. Bregman, 349 Md. 142, 707 A.2d 806 (Md. 1998)* (violations of *Rule 1.5* may render a fee agreement unenforceable "unless they are merely technical, incidental, or insubstantial or when it would be manifestly unfair and inequitable not to enforce the agreement"); *Christensen v. Eggen, 562 N.W.2d 806 (Minn. Ct. App. 1997)* (fee agreements should be enforced in the face of "minor technical deficiencies with respect to the professional rules"); *Freeman v. Mayer, 95 F.3d 569 (7th Cir. 1996)* (applying Indiana law, technical violation of *Rule 1.5* was not a defense to terms of fee agreement); *Succession of Cloud, 530 So. 2d 1146 (La. 1988)* ("When an attorney enters into a contract with his client in *direct and flagrant* violation of a disciplinary rule, . . . this court, in order to preserve the integrity of its inherent judicial power, should prohibit the enforcement of the contract.").

n18 Moreover, on its face the Preamble says that a violation of a rule cannot be the basis for civil liability, especially as between "antagonists in a collateral proceeding" who have no standing to enforce the Rule. The Preamble's limitation on the Bar Rules, thus, would seem to apply more to fee disputes between lawyers or to fee awards in favor of prevailing parties. *See, e.g., Mary Jay Kaufman, P.A. v. Davis & Meadows, P.A., 600 So. 2d 1208, 1211 (Fla. 1st DCA 1992)* ("it is error to use an ethical rule as a basis to invalidate or render void a provision in a private contract between two parties; court enforced fee-splitting contract between lawyers notwithstanding alleged violation of *Rule 4-1.5*); *Corvette, 779 So. 2d at 531* (enforcing attorney fee award despite claim of Bar Rule violation because "the rule is intended to protect

the client and is not intended to shield a nonprevailing party from the payment of attorney's fees").

n19 *Rule 4-1.5(f)(2)* further provides:

> Every lawyer who accepts a retainer or enters into an agreement . . . contingent in whole or in part upon the successful prosecution or settlement thereof shall do so *only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved.* The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

n20 *E.g., Afrazeh v. Miami Elevator Co. of Am., 769 So. 2d 399, 402 (Fla. 3d DCA 2000)* (despite Rule violation by attorney not signing engagement agreement with client, contingent fee contract still enforceable and attorney could receive his share of fee award); *cf. Flynn, 169 F. Supp. 2d at 1370 n.6* (a valid fee agreement existed between lawyer who signed the engagement letter and client who did not sign but did accept the letter and lawyer's performance thereunder).

n21 *Rule 4-1.5(f)(1)* provides:

A contingency fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

n22 *Rule 4-1.5(g)* provides:

Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and: (1) the division is in proportion to the services performed by each lawyer; or (2) by written agreement with the client: (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

n23 *See, e.g., King, 709 So. 2d at 573-74* (although bonus fee component of contract was unenforceable, it was severable and remaining provisions of contract would be enforced); *Lackey, 855 So. 2d at 1188* (the inclusion of unenforceable terms did not void the entire fee contract); *see also Gold, Vann & White, P.A. v. Friedenstab, 831 So. 2d 692, 696 (Fla. 4th DCA 2002)* ("A bilateral contract is severable where the illegal portion of the contract does not go to its essence and, where, with the illegal portion eliminated, there still remain valid legal promises on one side which are

wholly supported by valid legal promises on the other.").

n24 *See, e.g., Nickerson v. Holloway, 220 Ga. App. 553, 469 S.E.2d 209 (Ga. 1996)* (corollary Code provision not violated "where the attorneys dividing the fee have both done some work on the case and there is no suggestion that the client's fee is inflated or unreasonable"); *Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. Ct. App. 1993)* (*Rule 1.5(g)* not violated where division of fees was made in good faith and proportional to services rendered; lawyer's participation as second chair at trial that led to favorable settlement was a substantial contribution to the outcome); *McNeary v. American Cyanamid Co., 105 Wn.2d 136, 712 P.2d 845 (Wash. 1986)* (corollary Code provision satisfied when lawyers agreed to substantial division of services of responsibility); *Martinez v. Los Angeles County*, 151 Cal. Rptr. 50 (Cal. Ct. App. 1978) (rule satisfied where agreement to divide fee was based on a good faith division of services and responsibility at the time of contracting).

n25 *Rule 4-1.8* prohibits an attorney from knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to his client unless "the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client."

n26 *Kilgore* was applying the traditional rule of joint venture relationships that had been previously adopted in Georgia. *See Nickerson v. Holloway, 220 Ga. App. 553, 469 S.E.2d 209 (Ga. 1996)* ("lawyers jointly

undertaking to represent a client without a contract as to the division of fees share equally" quoting *Glover v. Maddox, 98 Ga. App. 548, 106 S.E.2d 288 (Ga. 1958)). As Nickerson* recognized, this is the rule that has been followed in most other jurisdictions. *469 S.E.2d at 210* (citing *Stissi v. Interstate & Ocean Transp. Co., 814 F.2d 848 (2d Cir. 1987)* (applying New York law) and *Schniederjon v. Krupa, 130 Ill. App. 3d 656, 474 N.E.2d 805, 85 Ill. Dec. 845 (Ill. Ct. App. 1985)).*

n27 Similarly, these principles may also apply to a situation where a lawyer/co-venturer does not die but, instead, is suspended or disbarred from the practice of law for reasons unrelated to that particular client representation. In those cases, the disbarred lawyer retains his contractual right to share in the fees that he was due as a member of the joint venture. *E.g., Nickerson, 469 S.E.2d at 211; Rutenbeck v. Grossenbach, 867 P.2d 36, 37 (Colo. Ct. App. 1993).*

n28 Although SCEC never expressly acknowledged the relevance of these joint venture principles in this case, SCEC relied upon related cases in arguing that Faro's discharge abrogated all rights to a contingent fee in the case. SCEC, however, misreads these cases. *In re Hasting's Estate, 108 Cal. App. 2d 713, 239 P.2d 684 (Cal. Ct. App. 1952),* actually supports the very proposition that this Court relies upon that both the surviving and deceased members of a joint venture for legal representation are entitled to recover under a contingent fee contract. The other case cited, *In re Brown's Estate, 48 N.M. 580, 154 P.2d 247 (N.M. 1944),* is quite distinguishable on its facts. The court in that case "abrogated" a fee contract after the discharge of one of the lawyers for equitable reasons -- to provide *greater* compensation to the surviving lawyers who had

to perform far more work than originally contemplated. None of these cases disagree with the principles set forth above.

n29 "This is an unfortunate case for the legal profession. Regardless of the outcome of these proceedings, this case, in all likelihood, will, justifiably or not, cause some segments of the legal profession to suffer further disrepute. This is particularly unfortunate because the disputes at issue could clearly have been avoided by a more carefully drawn contract document which the experienced attorneys involved were fully capable of preparing." *May v. Sessums & Mason, P.A., 700 So. 2d 22, 28 (Fla. 2d DCA 1997).*

n30 Additionally, Ross is factually incorrect in attempting to rely on future use revenues on the SCEC patents as a basis to increase his total contingent fee. Even as of this date, the SCEC patents have never been adjudicated as valid patents. The Eleventh Circuit's decision in Fed I vacated the judgment in this respect with respect to the obviousness defense. Any future infringer could still litigate the issue in another case. Therefore, Ross has garnered no tangible benefit to SCEC in this respect on which to calculate a contingent fee.

n31 If SCEC wishes to have the Court revisit this matter and supplement the record with a statement of their litigation costs incurred prior to the settlement, it can do so on a motion to amend the final order discharging Ross's charging lien. The Court notes, however, that the difference in the contingent fee in this case when measured against the gross or net recovery is likely to be negligible.

n32 SCEC relied upon *Fed. R. Evid. 408* in support of its objections. That rule, however, did not preclude the settlement's admission because Ross was not relying on the settlement to prove liability of *Faro's* claim. Ross was introducing the settlement for a different purpose. *Rule 408* would not apply in that situation. The Court admitted the fact of the settlement at the time believing that its relevance was simply to show that the client acknowledged the existence of the original contingent fee. Ross did not argue at the time, however, that he believed the Faro settlement was relevant to mathematically derive his own contingent fee. Had Ross made that argument at the time, a relevance objection may indeed have been sustained.

05-1423, 05-1528

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STATE CONTRACTING & ENGINEERING CORPORATION,
Plaintiff-Appellee,

v.

CONDOTTE AMERICA, INC. (formerly known as Recchi America, Inc.), THE MURPHY CONSTRUCTION COMPANY, THE HARDAWAY COMPANY, HUBBARD CONSTRUCTION COMPANY, BALFOUR BEATTY CONSTRUCTION, INC., COMMUNITY ASPHALT CORPORATION, and HANSON PIPE & PRODUCTS SOUTHEAST, INC. (formerly known as Joelson Concrete Pipe Company, Inc.),
Defendants,

v.

RICHARD S. ROSS, ESQ.,
Movant-Appellant.

October 2, 2006, Decided

October 2, 2006, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES

GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

OPINION: ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 10, 2006.

Law Offices
FARO & ASSOCIATES
P.O. Box 4904
Miami, Florida 33149-4904

May 1, 1997

Mr. Tim Smith, President
State Contracting & Engineering Corp.
4300 Ravenswood Road
Ft. Lauderdale, FL 33312

Re: Engagement Letter

Dear Tim:

This letter will reflect the conversation between you and I, and between myself and my co-counsel Mr. Richard Ross, in regard to the representation of your Company in a patent infringement action to enforce US Patents 5,234,288 & US Patent No 5,429,455 against the State of Florida and one or more third parties that may also be liable for infringement.

As you know a validity search has been conducted in order to independently assess the relative strength of this patent, and in anticipation of an attack upon its enforceability by the alleged infringers. The results of this search have been obtained and reviewed and do not preclude going forward with the anticipated litigation. Notwithstanding, the search did reveal new prior art that was not reviewed by the Patent Office at the time of examination of the issued patents. Accordingly, it is anticipated that an attack upon the validity of the subject patents will be asserted in defense of the claim

of infringement, based upon this same new prior art. Moreover, because of the Uncertainty of the outcome in this as in any litigation, a straight contingent fee arrangement is neither acceptable nor fair fee arrangement.

Both myself and my co-counsel, Mr. Ross, propose and are agreeable to the following arrangement:

1. Reduced hourly billing fee of $100 per hour, plus expenses; plus

2. A Contingent Fee, as set forth in the current Standard Florida Bar Contingent Fee Schedule, copy of Schedule and & Statement of Client Rights attached; less

3. A Credit of all attorney fees billed and collected against recovery at the time of settlement, however, in no event would the amount of the net fee for representation be less than one third of the value of the settlement to your Company.

In the unlikely event that your Company defaults in its obligation under this Agreement, both myself and Mr. Ross reserve the right to turn your account over for collection, in which event your Company would also be potentially responsible for the costs of collection, including attorney fees.

If this arrangement is acceptable to your Company, please countersign this proposal on behalf your Company in space provided for your signature. A retainer of $7,500 is required, with $5,000 being made payable to Richard Ross, P.A. Trust Account and

$2,500 being made payable to Faro & Associates, P.A. Trust Account.

Sincerely,

Read & Understood

[signature]
Mr. Tim Smith, President

Sincerely,

[John H. Faro signature]

JOHN H. FARO

cc: Richard Ross

(2)

No. 06-1075

FILED
MAR 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RICHARD S. ROSS, ESQ.,

Petitioner,

v.

STATE CONTRACTING & ENGINEERING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

JOHN H. PELZER
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STATEMENT OF FACTS

State Contracting must write to correct certain misstatements of the facts and procedural history in order to avoid being bound by them in the unlikely event that this Court grants certiorari. Supreme Court Rule 15.

Ross states that he signed the engagement letter with State. Petition, p.7, 8. This is inaccurate. To the contrary, the magistrate found that

> Ross claims to have signed the original Engagement Letter in June 1997. The evidence of that is conflicting, at best. No copy of that signed Engagement Letter ever surfaced throughout this litigation until after Ross prosecuted this charging lien proceeding. Only Ross claims to have had a copy of that signed letter, misplaced in his files, which copy was only found earlier this year [during the charging lien litigation].

App.163.

Ross states that there was no agreement between himself and Faro as to the division of the contingency fee, but that an equal division was "assumed." Petition, p.8. However, "Ross testified that it [sic] he had a verbal agreement with Faro that the contingency fee would be split equally (*i.e.* 50/50)." App.104. In addition, there is no record support for Ross' characterization of the payment to Faro as a *quantum meruit* measure. *See* Petition, p.11.

The Petition also inaccurately describes State's position in the charging lien litigation, suggesting that State provoked the charging lien litigation by refusing to pay Ross more than

quantum meruit. Petition, p.11, 12. From the moment the contingency occurred, State attempted to pay the fees to Ross and Faro in a manner consistent with the rulings of the magistrate, the district court, and the court of appeals, based on the money received in the settlement. App.121. This was prevented by Ross' position that he was also entitled to fees that were calculated upon the value of State's "future use and licensing revenues of the patented method." App.122. According to Ross, this was roughly double the amount that State received in the settlement, App.89, and therefore would have doubled his fee. This claim by Ross, in addition to his unwillingness to abide by his fee splitting agreement with Faro, required resolution by the magistrate, App.150-162, and the district court, App.76-83, and consumed virtually all of the labor of the court of appeals.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' INTERPRETATION OF FLORIDA LAW DOES NOT JUSTIFY GRANTING THE PETITION.

As Ross concedes, the court of appeals' decision turned entirely upon Florida state law, developed in judicial decisions regarding attorneys' fees disputes. In so doing, the court of appeals ably distinguished the Florida decisions that Ross contends should have led to a different result. App.16, 17. Without belaboring the court of appeals' correct interpretation of Florida law, and Ross' failure to address the distinctions drawn by the court of appeals between this case and the cases relied upon by Ross, this dispute simply does not warrant certiorari review.

Ross places his principal reliance for the exercise of this discretion on *Leavitt v. Jane L.*, 518 U.S. 137 (1996). That case involved nullification of a state statute, unlike this case

involving application of court decisions. The court of appeals in *Leavitt* concluded that the Utah legislature actually meant the complete opposite of what it said. Despite the legislature having declared in its statute that it would have enacted each and every restriction on abortion individually, *id.* at 139, 140, the court of appeals concluded that the Utah legislature really believed the separate sections were interrelated so that one could not stand without the other. Thus, the court of appeals directly contradicted an unambiguous provision in the state legislation. That is a far cry from interpreting, applying and distinguishing multiple decisions of multiple state courts on various aspects of contractual attorneys' fees litigation.

II. FLORIDA STATE LAW REGARDING PREVAILING PARTY STATUS FOR A CONTRACTUAL FEES CLAUSE NEED NOT BE CONSISTENT WITH THE DEFINITION OF A PREVAILING PARTY UNDER FEDERAL CIVIL RIGHTS STATUTES.

Ross' argument on this point is dependent upon his mischaracterization of the positions of the parties in the lower tribunals. Ross simply persists in ignoring the importance of the issues that he raised but which were decided against him. *See,* App.34-36.

Ross relies upon this Court's decisions interpreting 42 U.S.C. § 1988, and assumes without analysis that they must also apply in state court contract litigation. The court of appeals decision applying well-settled Florida case law is unlikely to result in any confusion in determining prevailing party status in future federal civil rights litigation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

JOHN H. PELZER
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Attorneys for Respondent

(3)

No. 06-1075

IN THE

Supreme Court of the United States

RICHARD S. ROSS. ESQ., PETITIONER

v.

STATE CONTRACTING & ENGINEERING CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF

DENNIS P. DERRICK
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SUPPLEMENTAL CITATION OF AUTHORITY

Richard S. Ross, Esq. ("the petitioner" or "Ross"), respectfully supplements his Petition with the recently decided Florida state appellate case law, *Jay v. Trazenfeld*, Case No. 4D06-1711 (4th DCA Fla. [April 4, 2007]). (Supp. App. 1-5). This authority was not available when Ross filed his Petition.

In *Jay v. Trazenfeld*, like the present case, two lawyers of different firms represented a client to pursue a legal malpractice claim under a single written contingency fee agreement, and one of the lawyers was discharged while the case was pending. Further, just as in *Jay v. Trazenfeld*, the remaining attorney, like Ross, was initially retained as the attorney having primary litigation responsibility, (Pet. 8), and the discharged attorney was relegated to secondary matters. (Supp. App. 2). Relying on *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), cited throughout Ross' Petition, the Florida state appellate court acknowledged the client's obligation under the fee agreement to pay the remaining attorney the full contracted fee at the conclusion of the representation. In *Jay v. Trazenfeld*, the client did in fact pay the full contracted fee. (Supp. App. 3).

In rejecting the application of *Rosenberg* to this case, (App. 17), the majority panel of the Federal Circuit relieved State Contracting & Engineering Corporation's ("the respondent" or "State") from its obligation to pay the full contingency fee to Ross contrary to *Rosenberg* and *Jay v. Trazenfeld*, and only required State to pay 50% of the contracted fee. The Federal Circuit's divergence from Florida state law violates the unequivocal mandate of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny. (Pet. 23-

26).

Under *Jay v. Trazenfeld*, Ross would have received a different result had the matter been resolved by the Florida state courts. The state courts would have awarded Ross the full contracted fee, not 50% of the contracted fee awarded by the federal court had it abided by *Rosenberg*.[1] The federal court result thus creates two different bodies of law - federal common law and state law, leading to divergent rulings on the same issues of entitlement and amount thereby promoting forum shopping by attorneys and their clients. The "blatant federal-court nullification of state law," *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-145 (1996), by the Federal Circuit should invoke this Court's superintendency power to ensure the precedent of *Erie* and its progeny is upheld and enforced. Respectfully, the supplemental citation of authority supports this Court's grant of the Petition for the reasons stated therein, and above. Ross is entitled to the full contracted fee as a matter of Florida law.

Respectfully submitted,
Dennis P. Derrick

---

[1]Subject to a yet unresolved determination between Ross and his former co-counsel of the amount, if any, of a fee split between them. Interestingly, the Federal Circuit also diverged from state law when it rejected Ross' argument that any fee reduction should be limited to no more than 25%, (App. 14-15), because the underlying representation did not relate to an action for personal injury or property damage under the Rules Regulating the Florida Bar, Rule 4-1.5(f)(4)(D). (App. 15). However, the *Jay v. Trazenfeld* court makes clear that the 25% limitation can apply to non-personal injury/property damage matters, i.e. legal malpractice, (Supp. App. 2, 4), like the underlying patent infringement action.

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(any footnotes trail end of each document)

No. 4D06-1711
COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

SCOTT R. JAY,
Appellant,

v.

WARREN R. TRAZENFELD; and WARREN R. TRAZENFELD, P.A.,
Appellees.

April 4, 2007, Decided

NOTICE: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

COUNSEL: Ronald S. Lowy, Ronald S. Lowy, P.A., Miami, for appellant.

Warren R. Trazenfeld, Warren R. Trazenfeld, P.A., Miami, for appellee.

JUDGES: FARMER, J. STONE and MAY, JJ., concur.

OPINION BY: FARMER

OPINION: FARMER, J.

Two attorneys of different firms hired as co-counsel dispute the division of fees due under a written contingency fee agreement that said:

> "[Clients] hereby *retain and employ Warren R. Trazenfeld*, P.A., *and Scott Jay*, Esq., to pursue a legal malpractice claim against Spence, Payne, et al. and all other culpable parties. *As compensation* for the services rendered by our attorneys, *they will be paid* from the gross proceeds of any money collected a contingent fee based upon the following percentage: a) 40% of any recovery up to $ 1 million; b) 30% of any recovery between $ 1-2 million; c) 20% of any recovery in excess of $ 2 million . . . ." [e.s.]

This fee agreement makes no distinction as to the responsibility of each attorney, and thus both appear to be equally responsible to the client for the representation. Obviously there was a recovery in the malpractice action. The total fee due from the client was deducted from the client's share of the proceeds and part now lies in escrow. The issue is how to divide the fee between these joint counsel.

The subject of the claim for legal malpractice identified in the fee agreement was a prior tort suit in which Spence Payne had represented the client. That litigation resulted in an unsatisfied money judgment. Jay was then retained by the client to attempt collection of the judgment. During this representation, Jay discovered evidence of the malpractice claim against Spence Payne and enlisted Trazenfeld to participate in the malpractice action. Then during the malpractice litigation, Trazenfeld advanced a claim that

Jay also had committed legal malpractice in his prior handling of the case, leading to the client formally terminating Jay from further representation. Jay was then added as a defendant in the malpractice litigation. But the trial court dismissed the claim against Jay. In an appeal from that decision we affirmed the dismissal, saying that "[u]nder no interpretation of these facts can Jay be liable for [malpractice] . . . ." *Kates v. Robinson*, 786 So. 2d 61, 65 (Fla. 4th DCA 2001).

On remand, the case against Spence Payne went to trial and resulted in a recovery of $ 485,000. After clients received their net proceeds of the recovery, Trazenfeld claimed the entire fee due under the agreement, nearly $ 218,000. Jay filed a notice of charging lien claiming 25% of the fee. The trial court dissolved the charging lien, citing our previous decision, the effect of which is that Jay was determined not to be entitled to any part of the fee. He appeals and we reverse.

The division of the fee is governed by the written fee contract. It is not ambiguous. It clearly provides for joint sharing between Trazenfeld and Jay without specifying that the share of each is anything other than an equal share. Although Jay was fired when Trazenfeld accused him of malpractice, our previous decision implies that his termination should be deemed unjustified. As between him and Trazenfeld, Jay must be held without cause or blame. The consequence is that under the clear text of the agreement Jay would seem to be entitled to a fixed share of 50% of the fee.

But Jay does not seek an equal share of the fee. In a striking illustration of ethical punctilio despite financial disadvantage, he explains in his argument to this court

that he and Trazenfeld had an oral understanding-not then committed to writing--that Trazenfeld would be primarily responsible for the malpractice litigation and that he would be only secondarily responsible. Trazenfeld, he says, was designated to be lead counsel for trial, and he would be involved in pretrial matters and handle client communication. Thus, in spite of the clear text of the written fee agreement, Jay has requested only 25% of the fee as a secondary attorney under the Bar rule governing the division of contingency fees. *See* Rule 4-1.5(f)(4)(D), R. Reg. Fla. Bar. It is manifest to us that his charging lien is effective against Trazenfeld to enforce that claim.

We briefly address the legal argument consuming much of the attention of these lawyers and the trial judge. Trazenfeld argued that Jay's only claim, if any, should be in quantum meruit under *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982). Because Jay had failed to keep contemporaneous time records, Trazenfeld argued, Jay forfeited any right to a share under *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). *Rowe* was cited for the proposition that time records are indispensable to a division of the fee. Under the circumstances of this case we reject this argument.

The rule of *Rosenberg v. Levin* applies to fees due from *the client* to the attorney when counsel has withdrawn before the occurrence of the contingency. By the express language of *Rosenberg v. Levin* the quantum meruit rule fixes *the client's* obligation only when counsel has been discharged without cause before the contingency has occurred.[1] There is no dispute in this case as to the client's fee which has actually been paid by the client. As we have noted, the written fee

agreement provides that co-counsel are jointly owed the fee. And because the contract did not specify otherwise, the division of the fee would ordinarily be equal-thus undifferentiated and fixed. Quantum meruit under *Rosenberg v. Levin* does not apply.

As to the failure to keep contemporaneous time records, there are circumstances when such records would not affect the result. In *Searcy Denney Scarola Barnhart and Shipley v. Poletz*, 652 So. 2d 366 (Fla. 1995), the court explained:

> "In *Rowe*, we adopted the 'lodestar' method to establish a fair and reasonable attorney fee *in those cases where the fee will be paid by someone other than the client who received the services. . .*
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> .
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> "The conventional lodestar approach is ill-suited for the task of assessing attorney's fees due as damages for breach of an agreement for the payment of fees because it does not allow for consideration of 'the totality of the circumstances surrounding the professional relationship.' " [e.s.]

652 So. 2d at 368, 368-69. Here where the fee agreement effectually makes the division, it would serve no purpose to keep such records to establish the share of each. In this kind of joint representation, counsel may recognize from the beginning of their undertaking that the amount of time spent by either will not control the division. They may even anticipate that the time of each will be unequal, but their business decision in structuring the fee division will control. As long as such a division is not unreasonable and does not violate the

regulatory rules of The Florida Bar, there is no good reason why courts should resort to time records to divide the fee.

In this case, attorney Jay has been forthcoming and candid in acknowledging that by oral understanding his share was to have been only 25%.[2] We commend him for his candor.

The order dissolving the charging lien is quashed. On remand the trial court shall enforce the charging lien against Trazenfeld to the extent of 25% of the total fee.

Reversed.

STONE and MAY, JJ., concur.

Footnotes

n1 As the *Rosenfeld* court explained:

> "There are two conflicting interests involved in the determination of the issue presented in this type of attorney-client dispute. The first is the need of the client to have confidence in the integrity and ability of his attorney and, therefore, the need for the client to have the ability to discharge his attorney when he loses that necessary confidence in the attorney. The second is the attorney's right to adequate compensation for work performed. To address these conflicting interests, we must consider three distinct rules.
>
> . . .

> It is our opinion that it is in the best interest of clients and the legal profession as a whole that we adopt the modified quantum meruit rule which limits recovery to the maximum amount of the contract fee in all premature discharge cases involving both fixed and contingency employment contracts. The attorney-client relationship is one of special trust and confidence. The client must rely entirely on the good faith efforts of the attorney in representing his interests. This reliance requires that the client have complete confidence in the integrity and ability of the attorney and that absolute fairness and candor characterize all dealings between them. These considerations dictate that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships."

409 So. 2d at 1019, 1021.

n2 Under rule 4-1.4(f)(4)(D), the division of a contingency fee between lawyers not in the same firm is limited to 75 for the lawyer primarily responsible and 25 for the lawyer secondarily responsible. Also rule 4-1.4(g)(1) permits a division in proportion to the services performed by each lawyer even without a written agreement as to the division of the fee. Jay's concession is entirely consistent with these rules.